

No. 2016

United States
Circuit Court of Appeals
For the Ninth Circuit.

EMERY VALENTINE,

Plaintiff in Error,

vs.

J. J. McGRATH and S. HIRSCH,

Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court for
the District of Alaska, Division No. 1.

FILED

OCT 28 1911

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INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Answer of S. Hirsch.....	7
Assignment of Errors....	90
Bill of Exceptions, Statement of Evidence and..	78
Bond on Writ of Error....	91
Citation in Error.....	115
Clerk's Certificate to Transcript.....	117
Complaint..	3
Conclusions of Law, Plaintiff's Request for	
Findings of Fact and.....	64
Cross-complaint of J. J. McGrath.....	14
Decision of Court.	93
Diagram.....	73

EXHIBITS:

Exhibit "A" to Cross-complaint (Deed Dated January 14, 1901, from Thomas R. Lyons to John J. McGrath).....	44
Exhibit "B" to Cross-complaint (Deed Dated July 13, 1898, from Thomas R. Lyons to Emery Valentine).....	47
Exhibit "C" to Cross-complaint (Deed Dated July 14, 1898, from Thomas R. Lyons to Emery Valentine).....	49

Index.	Page
EXHIBITS—Continued:	
Exhibit "D" to Cross-complaint (Deed Dated July 18, 1901, from Thomas R. Lyons to Emery Valentine).....	52
Findings of Fact and Conclusions of Law, Plain- tiff's Request for.....	64
Judgment.....	75
Opinion of Court.....	93
Order Allowing Bill of Exceptions, etc.....	87
Order Allowing Writ of Error and Fixing Amount of Security for Costs	89
Order Extending Time to File Transcript.....	92
Petition for Writ of Error.....	89
Plaintiff's Request for Findings of Fact and Conclusions of Law.....	64
Praecipe for Printing the Record.. ..	1
Praecipe for Transcript... ..	116
Reply to Answer and Cross-complaint of J. J. McGrath.....	56
Request, Plaintiff's, for Findings of Fact and Conclusions of Law.... .	64
Second Amended Answer of J. J. McGrath.....	11
Statement of Evidence and Bill of Exceptions..	78
TESTIMONY ON BEHALF OF PLAIN- TIF:	
VALENTINE, EMERY	79
Cross-examination.....	82
Writ of Error... ..	113

EMERY VALENTINE,

Plaintiff in Error,

vs.

J. J. McGRATH et al.,

Defendants in Error.

Praeipice for Printing the Record.

To the Clerk of the U. S. Circuit Court of Appeals
for the Ninth Circuit:

The plaintiff in error will rely in the Appellate Court upon the following errors assigned, to wit:

1st. The Court erred in not awarding to the plaintiff, Emery Valentine, that portion of Lot No. 1, in Block G, of the town of Juneau, described in the third cause of action in the complaint, and in the second amended answer of the defendant McGrath.

2d. The Court erred in not awarding to the plaintiff, Emery Valentine, that portion of Lot No. 1, in Block No. 3, of the town of Juneau, described in the first cause of action in the complaint; and further erred in awarding the same to the defendant McGrath, conditioned upon his paying any judgment that might be recovered against him for the value of said premises, together with damages for withholding the same, in any suit that said Valentine might bring within sixty days against the said McGrath.

3d. The Court erred in not awarding to the plaintiff, Emery Valentine, the sum of \$10.00 per month from May 1st, 1901, to the date of trial, as rentals on the property in controversy.

4th. The Court erred in adjudging that each party pay their own costs, and in not adjudging that

plaintiff recover costs of the defendants.

And the following portions of the record are not material to a consideration and determination of the errors so assigned, and no bearing whatever upon any of the questions to be argued thereunder, and you will therefore omit the same in printing the record, to wit:

1st. All captions and titles of cause and paper, after the complaint, but including in the printed record the full endorsements on such papers.

2d. The following portions of the bill of exceptions, to wit:

Omit from and inclusive of page 67 to and inclusive of page 80.

Print from and inclusive of page 81 to and inclusive of page 88.

Omit from and inclusive of page 89 to and inclusive of page 339.

J. H. COBB,

Attorney for Plaintiff in Error.

Service of the above and foregoing Preacipe for printing the record is admitted this Aug. 7th, 1911.

LEWIS P. SHACKLEFORD,

Attorney for Defendants in Error.

[Endorsed]: No. 2016. In The United States Circuit Court of Appeals for the Ninth Circuit. Emery Valentine, Plaintiff in Error, vs. J. J. McGrath et al., Defendants in Error. Preacipe for Printing Transcript. Filed Aug. 19, 1911. F. D. Monckton, Clerk.

*In the District Court for Alaska, Division No. 1,
at Juneau.*

#613.

EMERY VALENTINE,

Plaintiff,

vs.

J. J. McGRATH and S. HIRSCH,

Defendants.

Complaint.

The above-named plaintiff, complaining of the above-named defendants, for cause of action alleges:

I.

That plaintiff is the owner in fee simple of lot No. 1, in Block 3 of the town of Juneau, Alaska, according to the official plat of said town, and is entitled to the possession thereof.

II.

That heretofore, to wit, on or about the 1st day of May, 1901, the defendants wrongfully entered upon a portion of said lot and ejected plaintiff therefrom and have ever since and do now withhold from plaintiff the possession thereof. That the portion of said lot so entered upon by the defendants is described as follows:

Beginning at the Southeasterly corner of said lot identical with the Southwesterly corner of Lot No. 2 in same block; thence North 44° West 3.3 feet; thence South 3.3 feet to a point on the South boundary line of said Lot No. 1 1.5 feet distant from the Southeasterly corner of the same; thence along the South-

erly boundary line of said lot to the place of beginning.

III.

That the rental value of said premises is the sum of \$1.00 per month and plaintiff has been damaged by reason of the premises in the sum of \$72.00. [1*]

And for a second and further cause of action against the defendants, plaintiff alleges:

I.

That plaintiff is the owner in fee simple and entitled to the possession of lots Nos. 2 and 3 in Block No. 3, in the town of Juneau, Alaska, according to the official plat thereof, and is entitled to the possession of said lots.

II.

That heretofore, to wit, on or about the 1st day of May, 1901, the defendants with force and arms entered upon a portion of said lots and ejected the plaintiff therefrom and have ever since and do now withhold from the plaintiff the possession thereof. That the portion of said lots so entered upon and withhold by defendants is described as follows:

First: Beginning at a point on the common boundary line between said Lots 2 and 3, 11.1 feet from the Northeast corner of Lot No. 2 and the Northwest corner of Lot No. 3; thence North $59^{\circ} 9'$ East 10 feet more or less to the corner of the building occupied by defendants; thence South $30^{\circ} 31'$ East 24.2 feet to the Southeasterly corner of said building; thence South $59^{\circ} 9'$ West 2.4 feet to the intersection of the common boundary line between said Lots 2 and 3; thence

*Page number appearing at foot of page of original certified Record.

North 44° West along said boundary line 23.5 feet; thence South $59^{\circ} 8'$ West 17.1 feet; thence South $29^{\circ} 8'$ East 23.3 feet; thence North $30^{\circ} 51'$ West 24.2 feet to the corner of the building occupied by defendants; thence North $59^{\circ} 9'$ East to the place of beginning.

Second: Beginning at a point on the common boundary line between said Lots 2 and 3, 29.6 feet distant from the Southwest corner of Lot No. 3 and the Southeast corner of Lot No. 2; thence South $70^{\circ} 6'$ East 3.8 feet; thence north $40^{\circ} 6'$ East 3.3 feet; [2] thence South $19^{\circ} 54'$ West 5.2 feet to the common boundary line between said Lots 2 and 3; thence South 44° West along said common boundary line to the point of beginning.

Third: That the premises so withheld by the defendants from plaintiff are of the reasonable value of \$15.00 per month and plaintiff has been damaged by defendants by reason of the premises in the sum of \$1080.00.

And for a third cause of action plaintiff alleges:

I.

Plaintiff is the owner in fee simple and is entitled to the possession of that portion of Lot No. 1, in Block G, in the town of Juneau, Alaska, according to the official plat thereof, described as follows:

Beginning at a point on the common boundary line between Lot No. 1, in Block No. 3, and Block G about 2 feet distant Westerly from the Southeast corner of said Lot No. 1; thence Southeasterly 33.7 feet to a point on the South boundary line of said Block G 51.8 feet Easterly from the West corner of said Block G; thence along the common boundary line be-

tween said Lot No. 1, in Block 3, and Block G to the point of beginning.

II.

That heretofore, to wit, on or about the 1st day of May, 1901, the defendants with force and arms entered upon a portion of the above-described premises and ejected the plaintiff therefrom and ever since have and do now withhold from him the possession thereof. That the portion of said premises so entered upon by defendant is described as follows:

Beginning at a point on the initial line above described where the front wall of the building now occupied by defendants intersects the same about 10 feet distant from the South end of said [3] line; thence South $83^{\circ} 4'$ West 2 feet; thence North $15^{\circ} 54'$ East 2 feet; thence at right angles to the last course about $11\frac{1}{2}$ feet to the intersection of the initial line to the point of beginning.

III.

That the rental value of the premises so withheld by defendants is the sum of \$1.00 per month and plaintiff has been damaged by reason of the premises in the sum of \$72.00.

Wherefore, plaintiff sues and prays judgment for the restitution of said premises and for judgment for the sum of \$1500 and costs of suit, and for general relief.

MALONY & COBB,

Attorneys for Plaintiff.

United States of America,
District of Alaska,—ss.

Emery Valentine, being first duly sworn, deposes

and says: I am the plaintiff above named. I have read the above and foregoing complaint and the same is true as I verily believe.

EMERY VALENTINE.

Subscribed and sworn to before me, this 26th day of April, 1907.

[Notarial Seal]

L. CHAPIN,

Notary Public for Alaska.

[Endorsed]: Original. No. 613-A. In the District Court for Alaska, Division No. 1, at Juneau. Emery Valentine, Plaintiff, vs. J. J. McGrath and S. Hirsch, Defendants. Complaint. Filed Apr. 26, 1907. C. C. Page, Clerk. By E. W. Pettit, Asst. Malony & Cobb, Attorneys for Plaintiff. Office, Juneau, Alaska. [4]

[Title of Court and Cause.]

Answer of S. Hirsch.

Comes now the defendant S. Hirsch, and for answer to plaintiff's complaint, admits, denies and alleges as follows:

I.

Referring to paragraph one (1) of plaintiff's complaint, this defendant has no knowledge or information sufficient upon which to found a belief as to the matters and things therein stated and therefore denies the same.

II.

Referring to paragraph two (2) of said plaintiff's complaint, this defendant denies each and every allegation therein contained.

III.

Referring to paragraph three (3) of said complaint this defendant has no knowledge or information sufficient upon which to found a belief and therefore denies each and every allegation therein contained.

IV.

Referring to paragraph one (1) of plaintiff's second and further cause of action, this defendant has no knowledge or information [5] sufficient upon which to found a belief as to the matters and things therein stated and therefore denies each and every allegation therein contained.

V.

Referring to paragraph two (2) of second and further cause of action, this defendant denies each and every allegation therein contained excepting the third subparagraph thereof and this defendant has no knowledge or information sufficient upon which to found a belief as to the matters and things therein stated and therefore denies each and every allegation therein contained.

VI.

Referring to paragraph one (1) of the third cause of action of said complaint, this defendant has no knowledge or information sufficient upon which to found a belief as to the matters and things therein stated and therefore denies each and every allegation therein contained.

VII.

Referring to paragraph two (2) of said third cause of action of said complaint, this defendant denies each and every allegation therein contained.

VIII.

Referring to paragraph three (3) of said third cause of action this defendant has no knowledge or information sufficient upon which to found a belief and therefore denies each and every allegation therein contained.

For a further and separate cause of action and affirmative defense, this defendant alleges that he entered into possession, as lessee, under his codefendant, on the 7th day of [6] March, 1905, of the following described premises, to wit:

Beginning at a point on Front Street, whence the SW. Cor. of Block G bears N. $83^{\circ} 4'$ W. 51.8 ft.; thence N. $17^{\circ} 55'$ W. 92.1 ft.; thence N. $29^{\circ} 9'$ W. 7 ft.; thence N. $30^{\circ} 51'$ W. 24.2 ft.; thence N. $59^{\circ} 9'$ E. 25.6 ft.; thence S. $30^{\circ} 51'$ E. 24.2 ft.; thence S. $50^{\circ} 9'$ W. 2.1 ft.; thence S. $44^{\circ} 00'$ E. 64.6 ft.; thence S. $16^{\circ} 46'$ E. 68.8 ft.; thence N. $83^{\circ} 4'$ W. 53.5 ft. to the place of beginning.

That this defendant entered upon said premises quietly and peaceably and without protest from anyone and that this defendant is now holding, and was at the commencement of this action holding possession of said premises by virtue of a lease executed to him by his codefendant herein on the 7th day of March, 1905.

Wherefore this defendant prays that the complaint herein be dismissed and that this defendant have and recover of and from the plaintiff his costs and disbursements incurred in this action.

LEWIS P. SHACKLEFORD,
Attorneys for Defendant S. Hirsch.

United States of America,
District of Alaska,—ss.

I, S. Hirsch, being first duly sworn, on oath say:
That I am one of the defendants in the above-entitled
action; that I have read the foregoing Answer and
know the contents thereof and believe the same
to be true; that I make this verification because

S. HIRSCH.

Subscribed and sworn to before me this 13th day of
October, A. D. 1907.

[Seal]

T. R. LYONS,

Notary Public for Alaska. [7]

I hereby certify that I served a copy of the fore-
going Answer certified to by Lewis P. Shackelford,
attorney for defendants by leaving said copy in the
office of Malony & Cobb, attorneys for plaintiff on
the 13th day of Dec., 1907, between the hours of 9
o'clock A. M. and 4 o'clock P. M. of said day.

T. R. LYONS.

[Endorsed]: Original. No. 613-A. In the Dis-
trict Court for the District of Alaska, Division No. 1,
at Juneau. Emery Valentine, Plaintiff, vs. J. J. Mc-
Grath & S. Hirsch, Defendants. Answer of S.
Hirsch. Filed Dec. 13, 1907. C. C. Page, Clerk.
By R. E. Robertson, Asst. Shackelford & Lyons, At-
torneys for Defendants. Office: Juneau, Alaska.
[8]

[Title of Court and Cause.]

Second Amended Answer of J. J. McGrath.

Comes now the above-named defendant, J. J. McGrath, and for his second amended answer to plaintiff's complaint herein, shows to this Court:

I.

Answering plaintiff's first cause of action:

(1) This defendant denies each and every allegation, matter and thing in said first cause of action in plaintiff's complaint set out.

(2) For a further and second defense to said first cause of action in plaintiff's complaint set out, this defendant alleges that he, up to and until the commencement of this action and for more than seven (7) years immediately prior thereto, has been in the actual, uninterrupted, exclusive, adverse, open, notorious, continuous and hostile possession and occupancy of the premises described in said first cause of action under color and claim of title thereto, and, at the time of the commencement of this action, was, ever since has been, and now is in such actual, uninterrupted, exclusive, adverse, open, notorious, continuous and hostile possession and occupancy, and this defendant is now, and at the time of the commencement of this [9] action, was the owner in fee of said premises and entitled to the possession thereof.

(3) For a further and third defense to said first cause of action in plaintiff's complaint set out, this defendant alleges that neither the plaintiff nor any of his ancestors, predecessors or grantors was seized

or possessed of the premises described in said first cause of action at any time within ten (10) years before the commencement of this action, but that, on the contrary, this defendant and his grantors and predecessors in interest have been in the actual, uninterrupted, exclusive, adverse, open, notorious, continuous and hostile possession and occupancy thereof, under color and claim of title thereto, ever since the year 1882.

II.

Answering plaintiff's second cause of action:

(1) This defendant denies each and every allegation, matter and thing in said second cause of action in plaintiff's complaint set out.

(2) For a further and second defense to said second cause of action, this defendant alleges that he, up to and until the commencement of this action and for more than seven (7) years immediately prior thereto, has been in the actual, uninterrupted, exclusive, adverse, open, notorious, continuous and hostile possession and occupancy of the premises described in said second cause of action, under color and claim of title thereto, and at the time of the commencement of this action was, and ever since has been, and now is, in such actual, uninterrupted, exclusive, adverse, open, notorious, continuous and hostile possession and occupancy, as above set out, and he is now, and at the commencement of this action was the owner in fee of said premises and entitled to the possession thereof. [10]

(3) For a further and third defense to said second cause of action in plaintiff's complaint set out,

this defendant alleges that neither the plaintiff nor any of his ancestors, predecessors or grantors was seized or possessed of the premises described in said second cause of action at any time within ten (10) years before the commencement of this action, but that, on the contrary, this defendant and his grantors and predecessors in interest have been in the actual, uninterrupted, exclusive, adverse, open, notorious, continuous and hostile possession and occupancy thereof, under color and claim of title thereto, ever since the year 1882.

III.

Answering plaintiff's third cause of action:

(1) This defendant denies each and every allegation, matter and thing in said third cause of action in plaintiff's complaint set out.

(2) For a further and second defense to said third cause of action, this defendant alleges that he, up to and until the commencement of this action and for more than seven (7) years immediately prior thereto, has been in the actual, uninterrupted, exclusive, adverse, open, notorious, continuous and hostile possession and occupancy of the premises described in said third cause of action, under color and claim of title thereto, and at the time of the commencement of this action was, and ever since has been, and now is, in such actual, uninterrupted, exclusive, adverse, open, notorious, continuous and hostile possession and occupancy, as above set out, and he is now, and at the time of the commencement of this action, was the owner in fee of said premises and entitled to the possession thereof.

(3) For a further and third defense to said third cause [11] of action in plaintiff's complaint set out, this defendant alleges that neither the plaintiff nor any of his ancestors, predecessors or grantors was seized or possessed of the premises described in said third cause of action at any time within ten (10) years before the commencement of this action, but that, on the contrary, this defendant and his predecessors in interest have been in the actual, uninterrupted, exclusive, adverse, open, notorious, continuous and hostile possession and occupancy, under color and claim of title thereto, ever since the year 1882.

Wherefore, this defendant prays that plaintiff take nothing by this action and that this defendant have judgment herein, decreeing and adjudging that he is the owner of each and all of the various parcels of land and premises described in the plaintiff's complaint herein, and that this defendant have his costs and disbursements in this action.

Cross-Complaint [of J. J. McGrath].

I.

Comes now the defendant above named, J. J. McGrath, for the purpose of securing equitable relief against plaintiff in the above-entitled cause, and shows to this Honorable Court:

(1) That heretofore, to wit, on the 9th day of December, 1889, this defendant purchased, for a valuable consideration, and pursuant to such purchase received a deed of conveyance to and became the owner of that certain piece or parcel of land situated in the townsite of Juneau, in Juneau Recording Pre-

cinet, Alaska, described in paragraph two (2) of plaintiff's first cause of action in plaintiff's complaint set out, to wit:

Beginning at the southeasterly corner of Lot one (1), in Block three (3), of the townsite of Juneau, being identical with the southwesterly corner of Lot two (2) in Block three (3); thence N. 44° W. 3.6 feet; thence S. 3.6 feet to a point on the south boundary line of said Lot one (1) 1.5 feet distant from the [12] southeasterly corner; thence along the southeasterly boundary line of said lot one (1) to the place of beginning.

(2) That ever since the said 9th day of December, 1889, and under and pursuant to said purchase and deed, this defendant has been in the sole, actual, uninterrupted, exclusive, adverse, open, notorious, continuous and hostile possession and occupancy of said premises, under color and claim of title thereto, and this defendant's grantors and predecessors in interest were, up to and until the time said premises were so purchased and taken possession of by this defendant, in the actual, uninterrupted, exclusive, adverse, open, notorious, continuous and hostile possession and occupancy thereof, under color and claim of right and title thereto since the year 1881.

(3) That on the 13th day of October, 1893, one John Olds, as trustee under and by virtue of sections 11, 12, 13, 14 and 15 of an act of Congress, approved March 3, 1891, entitled "An act to repeal timber-culture laws and for other purposes," duly entered at the United States Land Office, at Sitka, Alaska,

as a townsite, all of the lands embraced within the exterior boundaries of the townsite of Juneau, including the premises in paragraph one (1) hereof described, for the several use and benefit of the occupants of said townsite, and said John Olds and his successors in interest, as such trustees, have continued to hold said office of trustee for the townsite of Juneau since then and during all the time hereinafter mentioned, and that pursuant to said entry, and on the 4th day of September, 1897, a United States patent was issued to said John Olds, as such trustee, for the townsite of Juneau, Alaska, conveying to said Olds all of the lands and premises above described for the several use and benefit of the occupants of said townsite; that certificate of said entry and said patent was each within a month after issuance duly recorded in the office of the recorder for Harris Mining District, the present Juneau Recording [13] Precinct, wherein said land was and is situated, and are now of record in said office.

(4) That at the time the said townsite entry was made, as well as at the time said patent was issued, this defendant was the sole owner and sole and actual occupant of the premises described in paragraph one (1) of this cross-complaint, in manner and form as alleged in paragraph two (2) hereof, and continued such occupancy and possession ever after and was entitled to a deed from said townsite trustee for said premises; and prior to the said townsite entry, this defendant had erected and ever since has maintained and does now maintain upon said premises a valuable building and improvements, but that nev-

ertheless and on the 3d day of December, 1897, and while this defendant was in such sole and actual possession and occupancy of said premises, and while he had permanent and valuable improvements thereon, the plaintiff herein filed with the then trustee for said townsite an application for deed to all of said Lot One (1), in Block Three (3), including the premises described in paragraph one (1) hereof, together with this defendant's building and improvements thereon, and then and there, falsely and fraudulently, and with the intent and for the purpose of deceiving and misleading said trustee, and for the purpose of inducing said trustee into believing that said plaintiff was then and ever since prior to the said townsite entry had been the actual occupant of said premises and entitled to a deed therefor, and for the purpose and with the intent of cheating, defrauding and depriving this defendant of his said property, represented to said trustee that he, the said plaintiff, was then and ever since prior to the said townsite entry had been the actual occupant and owner of said premises and the whole thereof and entitled to a deed [14] therefor from said trustee, although he, the said plaintiff, then and there well knew that he was not then and never had been either the owner or occupant of said premises in paragraph one (1) hereof described, or any part thereof, but that this defendant was and had been such exclusive owner and occupant, as above set out, and entitled to such deed.

(5) That by reason of said false and fraudulent representations by the said plaintiff, and not other-

wise, said trustee was induced to believe and did believe said representations to be true, and was thereby induced to believe that said plaintiff was then and ever since prior to the said entry had been the actual occupant of said premises and the whole thereof, and entitled to deed therefor; and that by reason thereof, the said trustee did, on the 13th day of July, 1898, execute to said plaintiff a deed conveying to him all of said Lot One (1), in Block Three (3), under and pursuant to said belief on the part of said trustee, so caused by said false and fraudulent representations that said plaintiff was then the actual occupant and owner of said premises, and had been such owner and occupant ever since prior to the said townsite entry, and the said deed so issued and executed was received by said plaintiff when, and notwithstanding the fact that, he knew it had been executed as a result of said false and fraudulent representations above set out, and notwithstanding the fact he knew that he, the said plaintiff, was not entitled to such deed, but that this defendant was entitled thereto, a copy of which deed is hereto attached and marked Exhibit "B."

(6) That this defendant, until a long time after said deed was issued, had no notice or knowledge of the fact that said plaintiff had applied to said trustee for a deed to the said premises or that plaintiff claimed or pretended to claim to be [15] the owner or occupant of the same, and at no time prior to the execution of said deed, or for a long time thereafter had any notice, knowledge, intimation or suspicion that plaintiff intended or in any manner en-

deavored to procure a deed to said premises, except as hereinafter set out, and had no opportunity to appear before said trustee to present his objections to the execution of such deed or to submit evidence of the falsity of the representations of plaintiff aforesaid, or to submit evidence before said trustee to the effect that not plaintiff, but this defendant was entitled to a deed for said premises; and this defendant further alleges that no time had or has ever been fixed by the Secretary of the Interior, or any other officer under him or by the said townsite trustee, within which the beneficiaries or *cestuis que trustent* of said townsite trust were required to file or submit their application for deed or evidence that they were occupants of town lots and entitled to such deeds, nor has any notice ever been published or given in any manner, by any trustee, officer or other party, informing or notifying this defendant or other occupants of town lots in the said townsite or any of the *cestuis que trustent* of said trust that unless their respective application for deeds were filed or submitted within a specified time their rights or claims to a deed or deeds from said trustee would be barred, and that said deed was so issued to said plaintiff without any time limit having been fixed by said trustee, or by the Secretary of the Interior, or any officer under him, within which this defendant's claim to said premises be presented lest he forfeit his right to said premises or to deed therefor, and that by reason of said facts and the further facts above set out that plaintiff was not entitled to deed for said premises, defendant

avers that said deed was executed without warrant in law and is wholly void [16] and of no effect, but has been ever since its issuance, and now is, a cloud upon defendant's right and title to said premises.

(7) That heretofore, to wit, on the 3d day of January, 1898, this defendant duly filed with the then trustee of said townsite an application in due form for the premises owned and occupied by this defendant in said townsite; that by reason of inadvertence and mistake, the premises occupied and owned by this defendant at the time said application was filed and ever since prior to the said townsite entry, was erroneously described as follows; to wit:

“That certain piece or parcel of land situated, lying and being between lots two (2) and three (3), in Block three (3), as per Hannan's plat, said piece or parcel of land fronting on the water front of said town of Juneau, and being sixty (60) feet in width on said water front street and extending back a distance of one hundred (100) feet, and being twenty-four (24) feet in width on or at the rear end or line of said described piece or parcel of land.”

That subsequently this defendant discovered that said description was erroneous and defective, and that it did not include all of the entire tract or property so occupied and owned by this defendant in said Block three (3) of said trustee's townsite plat; that upon said discovery by this defendant, he employed one George W. Garside, who was then and there a surveyor of good repute, holding a commis-

sion as United States mineral and land surveyor, and then believed by this defendant to be competent to survey the premises then actually occupied by this defendant, that such survey was consequently so made by said surveyor, and pursuant to such survey, the description of this defendant's said premises by metes and bounds was prepared by said surveyor as follows, to wit:

“Beginning at corner No. 1, on the Northeast side of Front Street, thence,

First Course S. 83 degrees, 4 minutes E. 6.5 feet along the NE. Line of said Front Street to corner of approach and [17] sidewalk to postoffice building, whence iron spike at the SW. corner of Block 2 of Official Survey, said spike being the Initial Point of such Survey, bears S. 64 degrees 40 minutes W. 296.2 feet distant, thence,

Second Course, S. 83 degrees 4 minutes E. 53.5 feet along NE. side of Front Street to SE. corner of Lot 1, in Block G, thence,

Third Course, N. 12 degrees, 30 minutes W. 76.9 feet, thence,

Fourth Course, N. 49 degrees, 45 minutes W. 95.8 feet to NE. corner of Lot 2, in Block 3, thence,

Fifth Course, S. 57 degrees, 52 minutes W. along the NW. end line of said Lot 2, in Block 3, 50 feet to NW. corner of said lot, thence,

Sixth Course, S. 44 degrees E. along the Westerly side line of said Lot 2, in Block 3, 100 feet to SW. corner of said lot, thence,

Seventh Course, S. 4 degrees, 38 minutes E. 32.2 feet to place of beginning;

The said described piece or parcel of land includes all of Lot 2, in Block 3, of Official Survey of town-site, and a fractional portion of Lot 3, in the same Block, together with a fractional portion of Block G lying between the SE. end line of said Lots 2 and 3, in Block 3, and Front Street, which latter fractional piece of Block G is described as follows, Commencing at Point No. 1 of the foregoing description of Exterior Boundaries, thence,

First Course, S. 83 degrees 4 minutes E. 60 feet along NE. side line of Front Street to SE. corner of Lot 1, in Block G, thence,

Second Course, N. 12 degrees 30 minutes W. 70.4 feet to intersection SE. end line Lot 3, in Block 3, thence,

Third Course, S. 57 degrees 52 minutes W. 55.3 feet to SW. corner of Lot 2 in Block 3, thence,

Fourth Course, S. 4 degrees, 38 minutes E. 32.2 feet to place of beginning, said fractional piece containing .0591 acres, and the whole area claimed containing .172 acres.”

That on the 9th day of December, 1898, this defendant's said application for deed was so amended as to insert the description of the property last above given instead of the description of the premises originally contained in said application as above set out; that this defendant is not a surveyor and believed the survey as made by said Garside was a correct survey of the premises then occupied and claimed by this defendant and believed the description last above quoted, which was prepared by said surveyor, was correct and included all the property

and premises then occupied by this defendant in said Block three (3), whereas, in truth and in fact, said survey was erroneous in this: that it failed to show or disclose the fact that the premises occupied and claimed by this defendant covered a portion of Lot one (1), in Block three (3), to wit, [18] that portion described in paragraph one (1) hereof; that at the time said survey was made and ever since before said townsite entry was made, this defendant had erected and maintained and does now maintain, upon said premises a large two-story frame store building, which at the time of said survey was known and designated as "McGrath's Postoffice Building"; that the westerly side wall of said building now stands, and ever since its erection has stood, upon a line running N. $17^{\circ} 55'$ W. from a point on the north line of Front Street, whence the west corner of Block G and the SW. corner of Block 3 bear N. $82^{\circ} 4'$ W. 51.8 feet distant, which line forms the westerly side line of the premises described in section one (1) hereof, that this defendant's said building then, and ever since its erection has, stood upon and covered all of said premises and there was not at the time of said survey, or at any other time, any difficulty in determining by mere inspection that said premises were claimed and actually occupied by this defendant, but that the lines and corners of the various lots into which the townsite had been subdivided by the survey of the townsite trustee were not marked and the boundaries of the various lots in said townsite could never be determined by anybody but a surveyor by the use of proper instruments for that purpose, and even then

with the greatest difficulty; that said surveyor failed to find or correctly establish the lines and corners of lot one (1), in block three (3), and failed to discover and disclose in his said survey that the said building and premises of this defendant covered and comprised said portion of said lot one (1), and that the SE. corner of said lot one was underneath said building; that this defendant had no means of ascertaining the lines or limits of the various lots and blocks as laid out and surveyed [19] by the townsite trustee except by the employment of a surveyor in the manner aforesaid, and this defendant was ignorant of the fact that said survey was incorrect in the manner above stated and that said lot one as laid out and platted by said trustee comprised part of this defendant's premises until this action was commenced.

(8) That pursuant to said application for deed by this defendant, and on the 14th day of January, 1901, the trustee of said townsite executed a deed conveying and intending to convey to this defendant, the premises described in paragraph one (1) hereof, a copy of which deed is hereto attached and marked Exhibit "A"; that the point of beginning, or initial point, of the description of the premises conveyed by said deed is a point on the northerly side line of Front Street from which the westerly corner of Block G and the SW. corner of Lot one, Block three, bears N. 83° 4' W. 51.8 feet distant, but that by clerical error on the part of the townsite trustee, the initial point of the said description is in said deed erroneously designated as follows: "Beginning at a point

on Front Street whence initial corner bears N. $83^{\circ} 4'$ W. 51.8 feet, thence S. $57^{\circ} 52'$ W. 234 feet distant"; when in fact and in truth it was the intention of this defendant, the said trustee and all parties concerned to designate the said initial point as follows, to wit: Beginning at a point on Front Street whence West corner of Block G, and SW. corner of Lot one, Block three, bears N. $83^{\circ} 04'$ W. 51.8 feet distant and initial corner bears S. $57^{\circ} 51'$ W. 234 feet distant; that the first course or first line from said point of beginning of the description in said deed contained runs N. $17^{\circ} 55'$ W, and intersects the southerly end line of said Lot one a distance of 1.5 feet westerly from the SE. corner of said Lot [20] and the easterly side line of said lot 3.6 feet northerly from said SE. corner, and includes in the premises conveyed by said deed the premises described in section one (1) hereof, it being the true intent of said trustee to convey to this defendant by such deed all the ground or premises lying east of said first course or line.

(9) That said deed of January 13, 1898, executed by said trustee to Emery Valentine, the plaintiff herein, for Lot one in Block three, was on the 20th day of July, 1898, duly recorded in the office of the Recorder of Juneau Recording Precinct, wherein said premises are situated, and is now of record therein; that said deed is a cloud upon this defendant's right and title to said premises in section one (1) hereof set out, and plaintiff herein is now relying on the said deed for his claim of title to said premises and has instituted this action at law on the strength of said deed, and not otherwise, and intends to prove

his title to said premises in this action by and through said deed and not otherwise; that the trustee of said townsite is now and ever since the execution of said deed to this plaintiff has been without legal title to said premises described in paragraph one (1) hereof, and without power to convey the same by deed to this defendant for the reasons above stated and that plaintiff is the owner and in possession of all those portions of lot one (1) in Block G, and lots one (1), two (2) and three (3), in Block three (3), not occupied and claimed by this defendant.

(10) That this defendant has no plain, speedy or adequate remedy in the ordinary course of law.

II.

For a further and second cause of action for equitable relief against plaintiff in the above-entitled cause, this defendant shows to this honorable Court: [21] (1) That heretofore, to wit. on the 9th day of December, 1889, this defendant purchased for a valuable consideration, took possession of and occupied as a town lot for use as a residence and business place, and pursuant to such purchase received a deed of conveyance to and became the owner of that certain piece or parcel of land situated in the townsite of Juneau, in Juneau Recording Precinct, Alaska, described as follows, to wit:

Commencing at the point on the north side line of Front Street whence west corner of Block G and SW. corner of Lot one (1), in Block three (3) bears N. 83° 04' W. 51.8 feet distant; thence N. 17° 55' W. 92.1 feet; thence N. 30° 51' W. 31.3 feet; thence N. 59° 09' E. 28.5 feet to the NE. corner of the building

occupied by the defendant, known as the "McGrath house"; thence S. $37^{\circ} 35'$ E. 87.17 feet to the SW. corner of Lot three (3), in Block three (3); thence S. $16^{\circ} 46'$ E. 68.8 feet to the north side line of Front Street; thence along the north side of Front Street N. $83^{\circ} 04'$ W. 53.5 feet to point of beginning.

(2) That ever since the 9th day of December, 1889, and under and pursuant to such purchase and deed, this defendant has been in the actual, uninterrupted, exclusive, adverse, open, notorious, continuous and hostile possession and occupancy of said premises, under color and claim of title thereto, as aforesaid, and this defendant's grantors and predecessors in interest were up to and until the time said premises were so purchased and taken possession of by this defendant in the actual, uninterrupted, exclusive, adverse, open, notorious, continuous and hostile possession and occupancy thereof, under color and right of title thereto since the year 1881, and during all that time and continuing to the present time, this defendant and his said grantors and predecessors in interest have maintained valuable improvements thereon in the way of a store building, shop and residence building and other improvements.

(3) That on the 13th day of October, 1893, and while this defendant was such sole exclusive occupant of said premises as above set out, one John Olds, as trustee, under and by virtue [22] of sections 11, 12, 13, 14, and 15 of an Act of Congress, approved March 3, 1891, entitled "an Act to repeal Timber Culture Laws and for other purposes," duly en-

tered at the United States Land Office at Sitka, Alaska, as a townsite, all of the lands embraced within the exterior boundaries of the townsite of Juneau, including the premises in paragraph one (1) hereof described, for the several use and benefit of the occupants of said townsite, and said John Olds and his successors in interest, as such trustees, have continued to hold said office of trustee for the townsite of Juneau since then and during all the time hereinafter mentioned, and that pursuant to said entry and on the 4th day of September, 1897, a United States patent was issued to said John Olds, as such trustee, for the townsite of Juneau, conveying to said Olds all of the lands and premises above described for the several use and benefit of the occupants of said townsite; that the certificate of said entry and said patent was each within a month after the issuance thereof duly recorded in the office of the recorder for Harris Mining District, now Juneau Recording Precinct, wherein said land is and was situated, and they are now of record in said office.

(4) That at the time the said townsite entry was made, as well as at the time said patent was issued, this defendant was the sole owner and sole and actual occupant of the premises described in paragraph one (1) of the second cause of action of this cross-complaint, in manner and form as alleged in paragraph two (2) hereof, and continued such occupancy and possession ever after and was entitled to a deed from said townsite trustee for said premises, and prior to the said townsite entry, this defendant had erected and ever since has maintained, and does

now maintain, upon said premises, valuable buildings and other improvements, but that, nevertheless, and on the 3d day of December, 1897, and while this defendant [23] was in such sole and actual possession and occupancy of said premises, and while he had permanent and valuable improvements thereon, the plaintiff herein filed with the then trustee for said townsite an application for a deed to all of said tract in paragraph one (1) of this cause of action described, together with this defendant's buildings and improvements thereon, and then and there falsely and fraudulently, and with the intent, and for the purpose of inducing said trustee into believing that said plaintiff was then, and ever since prior to the said townsite entry had been, the actual occupant of said premises and entitled to deed therefor, and for the purpose of and with the intent of cheating, defrauding and depriving this defendant of his said property, represented to said trustee that he, the said plaintiff, was then, and ever since prior to the said townsite entry had been, the actual occupant and owner of said premises, and the whole thereof, and entitled to a deed therefor from said trustee, although he, the said plaintiff, then and there well knew that he was not then and never had been either the owner or occupant of said premises in paragraph (1) hereof described or of any part thereof, but that this defendant was and had been such exclusive owner and occupant as above set out, and entitled to such deed.

(5) That by reason of said false and fraudulent representations by the said plaintiff, and not otherwise, said trustee was induced to believe and did be-

lieve that said plaintiff was then and ever since prior to the said entry had been the actual occupant of all of lot three in Block three of the townsite of Juneau, which said lot includes a portion of this defendant's premises as described in paragraph one (1) hereof, and that said trustee was by such false and fraudulent representations, induced to believe and did believe that said [24] plaintiff was entitled to a deed to the whole of said lot three (3), and that by reason thereof, the said trustee did, on the 14th day of July, 1898, execute to said plaintiff a deed conveying to him all of lot three (3), in Block three (3), under and pursuant to said erroneous belief on the part of the said trustee so caused by said false and fraudulent representations that said plaintiff was then the actual occupant and owner of said premises, and had been such owner and occupant ever since prior to said townsite entry, and the said deed so issued and executed was received by said plaintiff when, and notwithstanding the fact that he, the said plaintiff, knew it had been executed as a result of said false and fraudulent representations above set out, and notwithstanding the further fact that he knew that he, the said plaintiff, was not entitled to such deed, but that this defendant was entitled to a deed to as much of said lot three (3) as is included in the description of defendant's property set out in paragraph one (1) of this cause of action.

(6) That heretofore, to wit, on the 3d day of January, 1898, this defendant duly filed with the then trustee of said townsite an application in due form for the premises owned and occupied by this defend-

ant in said townsite; that by reason of inadvertence and mistake, the premises occupied and owned by this defendant, as above set out, at the time the said application was filed was erroneously described as follows, to wit:

“That certain piece or parcel of land situated, lying and being between lots two (2) and three (3), in Block three (3), as per Hannan’s plat, said piece or parcel of land fronting on the water front of said town of Juneau, and being sixty (60) feet in width on said water front street and extending back a distance of one hundred (100) feet, and being twenty-four (24) feet in width on or at the rear end or line of said described piece or parcel of land.” [25]

That subsequently this defendant discovered that said description was erroneous and defective and that it did not include all of the entire tract or property occupied and owned by this defendant in said Block three (3) of said trustee’s townsite plat; that upon said discovery by this defendant, he employed one George W. Garside, who was then and there a surveyor of good repute, holding a commission as United States Mineral and Land Surveyor, and then believed by this defendant to be competent to survey the premises then actually occupied by this defendant, as above set out; that such survey was consequently so made by said surveyor, and pursuant to such survey the description of this defendant’s said premises by metes and bounds was prepared by said surveyor, as follows, to wit:

“Beginning at corner No. 1, on the Northeast side of Front Street, thence,

First Course S. 83 degrees, 4 minutes E. 6.5 feet along the NE. line of said Front Street to corner of approach and sidewalk to postoffice building, whence iron spike at the SW. corner of Block 2 of Official Survey, said spike being the Initial Point of such Survey, bears S. 64 degrees 40 minutes W. 296.2 feet distant, thence,

Second Course S. 83 degrees 4 minutes E. 53.5 feet along NE. side of Front Street to SE. corner of Lot 1, in Block G, thence,

Third Course, N. 12 degrees, 30 minutes W. 76.9 feet, thence,

Fourth Course N. 49 degrees, 45 minutes W. 95.8 feet to NE. Corner of Lot 2, in Block 3, thence,

Fifth Course, S. 57 degrees, 52 minutes W. along the NW. end line of said lot 2, in Block 3, 50 feet to NW. corner of said lot, thence,

Sixth Course S. 44 degrees E. along the Westerly side line of said Lot 2 in Block 3, 100 feet to SW. corner of said lot, thence,

Seventh Course, S. 4 degrees, 38 minutes E. 32.2 feet to place of beginning:

The said described piece or parcel of land includes all of Lot 2 in Block 3, of Official Survey of townsite, and a fractional portion of lot 3 in the same Block, together with a fractional portion of Block G lying between the SE. end line of said Lots 2 and 3 in Block 3, and Front Street, which latter fractional piece of Block G is described as follows, commencing at Point No. 1, of the foregoing description of Exterior Boundaries, thence,

First Course S. 83 degrees 4 minutes E. 60 feet

along NE. side line of Front Street to SE. corner of Lot 1, in Block G, thence,

Second Course, N. 12 degrees 30 minutes W. 70.4 feet to intersection SE. end line Lot 3, in Block 3, thence, [26]

Third Course S. 57 degrees 52 minutes W. 55.3 feet to SW. corner of Lot 2 in Block 3, thence,

Fourth Course S. 4 degrees, 38 minutes E. 32.2 feet to place of beginning, said fractional piece containing .0591 acres, and the whole area claimed containing .172 acres."

That on the 9th day of December, 1898, this defendant's said application for deed was so amended as to insert the description of the property last above given instead of the description of the premises originally contained in said application as above set out; that this defendant is not a surveyor and believed the survey as made by said Garside was a correct survey of the premises then occupied and claimed by this defendant, and believed the description last above quoted, which was prepared by said surveyor, was correct and included all the property and premises then occupied by this defendant in said Block three; that at the time said amended application for deed was so filed the aforementioned deed to Lot three had already been issued to the plaintiff herein, as above set out, and the said town-site trustee then and there ruled and decided that by reason of having issued the said deed to lot three to this plaintiff, he, the said trustee, had parted with all title to said lot three and had no further jurisdiction over the same and could not and would not hear any

evidence of this defendant in support of his right to a deed to any portion of said lot three but that inasmuch as the deed had not, at that time, been issued by the said townsite trustee to Lot two (2), the said trustee ordered a hearing to be had for the purpose of determining whether this defendant or the plaintiff herein was entitled to a townsite trustee's deed to said Lot two (2), and how much of said Lot two (2) each was entitled to, if any; that pursuant to said order of the said trustee, a hearing was had and evidence introduced and adduced in support of the claims of the respective applicants for deed to Lot Two (2) and portions thereof; that at [27] the conclusions of said hearing, the said townsite trustee decided and adjudged that this defendant was entitled to deed to all of the premises that he then occupied and that this defendant had occupied said premises and was entitled to the possession thereof at the time the said townsite entry was made and ever after; that in endeavoring in his decision to describe the premises then actually occupied by this defendant and to which this defendant pursuant to the opinion and adjudication of the said trustee was entitled to deed for, said trustee through inadvertence and mistake described the said premises as follows, to wit:

“Portion of lot one block ‘G’ and portion of lot two, block three, Juneau, Alaska, more particularly described as follows:

Beginning at a point on Front street whence initial corner bears north 83° 4' west 51.8 feet; thence south 57° 52' west 234 feet distant; thence north 17°

55' west 92.1 feet; thence north $29^{\circ} 8'$ west 30.3 feet; thence north $60^{\circ} 52'$ east 18.1 feet; thence south 44° east 87.4 feet; thence south $16^{\circ} 46'$ east 68.8 feet; thence north $83^{\circ} 4'$ west 53.5 feet to point of beginning.

Whereas in truth and in fact said description so given unintentionally eliminates and excludes from the premises so decided to be the property of this defendant a portion of said defendant's premises and a portion of the very improvements which this defendant was then and ever since prior to the said entry had been maintaining on said premises, to wit: That upon the northerly end of the said premises described in section one (1) hereof, this defendant has had ever since prior to the said townsite entry, and now has, a residence building which extends to and occupies ground up to a line one (1) foot and six (6) inches north of the north line so inadvertently given by the townsite trustee, and that all of the premises described in the first paragraph of section two (2) in plaintiff's complaint was at the time of said contest, is now, and ever since prior to the said townsite entry has been covered in its entirety by the said residence building of this defendant, [28] and in rendering said decision, it was the intention of the said trustee to include all of said house or residence building, together with the ground upon which the same stood, save and except that portion of said house and premises standing on portion of lot three (3) as above stated and for the reasons heretofore set out, and that at the time the said decision was rendered, both plaintiff herein and this

defendant, as well as said townsite trustee, believed that said description above set out covered and included all the premises in said lot two (2) covered by said house of this defendant; that in truth and in fact the premises which the said townsite trustee then and there intended to deed to this defendant are described as follows, to wit:

Commencing at the north side line of Front street whence the westerly corner of Block "G" and the SW. corner of Lot One (1), in Block three (3), bears N. $83^{\circ} 04'$ W. 51.8 feet distant; thence N. $17^{\circ} 55'$ W. 92.1 feet; thence N. $30^{\circ} 51'$ W. 31.3 feet; thence N. $59^{\circ} 09'$ E. 18.5 feet more or less, to the dividing line between Lots two (2) and Three (3), in Block Three (3); thence S. 44° E. 88.9 feet; thence S. $16^{\circ} 46'$ E. 68.8 feet; thence N. $83^{\circ} 04'$ W. 53.5 feet to point of beginning.

That the said error in said description of the premises owned and occupied by this defendant was at the time of the rendition of said decision by said townsite trustee, as well as at the time of the issuance of the deed to this defendant, as hereinafter set out, unknown to said trustee and the parties hereof and that this defendant was not aware of the error in said description and survey until the commencement of this action.

(7) That pursuant to said decision by the said townsite trustee, and on the 14th day of January, 1901, the said trustee of said townsite executed a deed to this defendant, a copy of which deed is hereto attached and marked Exhibit "A"; that the point of beginning or initial point of the description of the

premises conveyed by said deed is a point on the northerly side line of Front Street from which the westerly corner of [29] Block "G" and the S. W. Corner of Lot one (1), in Block three (3), bears N. $83^{\circ} 04'$ W. 51.8 feet distant, but that by clerical error or some inadvertence on the part of the townsite trustee the initial point of the said description is in said deed erroneously designated as follows: "Beginning at the point on Front Street whence Initial Corner bears N. $83^{\circ} 04'$ W. 51.8 feet, thence S. $57^{\circ} 52'$ W. 234 feet distant." When in fact and in truth, it was the intention of this defendant, the said trustee and all parties concerned to designate the said initial point as follows, to wit: Beginning at the point on Front Street whence West corner of Block G and SW. corner of Block 3 bear N. $83^{\circ} 04'$ W. 51.8 feet distant, and initial corner bears S. $57^{\circ} 51'$ W. 234 feet distant.

(8) That that portion of said Lot three (3), belonging to and occupied by this defendant, as above stated, and which was included in the aforesaid deed of July 14, 1898, to the plaintiff is described as follows, to wit:

Beginning at the SW. corner of Lot three, the same being the SE. corner of Lot two, thence N. 44° W. along the common boundary line between said lots two and three 88.9 feet; thence N. $59^{\circ} 09'$ E. 10 feet to a point, the same being the NE. corner of the said residence building owned and occupied by this defendant; thence southerly to point of beginning.

That said portion of the said lot three (3) includes all the premises and tracts described in the second

cause of action of plaintiff's complaint herein except that portion of the premises described in said cause of action constituting a part or portion of said lot two (2); that said deed of July 14, 1898, was recorded on the 20th day of July, 1898, on page 203, Book 13 of Deeds, in the office of the recorder of Juneau Recording Precinct—a copy of which deed is hereto attached and marked Exhibit "C"; that this defendant was not aware and had no knowledge that the said townsite trustee intended to [30] issue a deed to this plaintiff for the entire portion of the said Lot three (3) until long after the said deed had been issued, and this defendant had no opportunity to appear before said trustee to present his objections to the execution of such deed or to submit evidence of the falsity of the representations of plaintiff aforesaid or to submit evidence before said trustee to the effect that not plaintiff but this defendant was entitled to a deed for said premises in this paragraph described; this defendant further alleges that no time had or has ever been fixed by the Secretary of the Interior or any other officer under him, or by the said townsite trustee within which the beneficiaries or *cestuis que trustent* or said townsite trust were required to file or submit their applications for deed or any evidence that they were occupants of town lots and entitled to such deeds; nor has any notice ever been published or given in any manner by any trustee, officer or other party, informing or notifying this defendant or other occupants of town lots in said townsite, or any of the *cestui que trustent* of said trust that, unless their respective application for

deeds were filed or submitted within a specified time, their rights or claims to a deed or deeds from said trustee would be barred, and that said deed was so issued to said plaintiff without any time limit having been fixed by said trustee or by the Secretary of the Interior, or any officer under him, within which this defendant's claim to said premises be presented lest he forfeit his right to said premises or to deed therefor, and that by reason of said facts and the further facts above set out that plaintiff was not entitled to a deed for said premises, defendant avers that said deed was executed without warrant of law and is wholly void and of no effect, but has been ever since its issuance, and now is, a cloud upon defendant's right and [31] title to said premises.

(9) That pursuant to his said decision involving the controversy before the said trustee, between this plaintiff and this defendant, concerning the right to the various portions of said Lot two (2), the said trustee, on the 18th day of July, 1901, executed to this plaintiff his deed to that portion of Lot two (2) not owned and occupied by this defendant, which deed was on the said 20th day of July, 1901, recorded on page 297, in Book 13 of Deeds, in the office of the recorder of Juneau Recording Precinct—a copy of which deed is hereto attached and marked Exhibit "D"; that by said inadvertence and mistake in the description of the premises, due to error in survey, the said deed was made to convey a portion of the premises then owned and occupied by this defendant, and which the said townsite trustee then intended to and believed he had deeded to this defendant pur-

suant to his said decision, which premises so erroneously and inadvertently included in said deed to this plaintiff are the same premises constituting a part of said Lot two (2) sued for by this plaintiff in his second cause of action in his complaint herein; that said error in said deed was unknown to this defendant until this action was commenced.

(10) That the said deeds, Exhibits "C" and "D," are, and each is, a cloud upon this defendant's right and title to the premises in section one (1) hereof set out, and plaintiff herein is now relying on the said deeds for his claim of title and right to the said premises, for the possession of which his said second cause of action is brought, and has instituted this action at law on the strength of said deeds and not otherwise; and intends to prove his title and right of possession to said premises in this action by and through said deeds and not otherwise; that the trustee of said townsite is [32] now and ever since the execution of said deeds has been without legal title to said premises described in paragraph one (1) hereof, and without power to convey the same by deed to this defendant for the reasons above stated, and that plaintiff is the owner and in possession of all those portions of lots two (2) and three (3) in said Block three (3) not occupied and claimed by this defendant.

(11) That this defendant has no plain, speedy and adequate remedy in the ordinary course of law.

Wherefore, this defendant prays that it may please this Honorable Court to consider, adjudge and decree:

(1) That the said plaintiff, Emery Valentine, is a trustee, holding in trust for this defendant, J. J. McGrath, that certain piece or parcel of land in the townsite of Juneau, Juneau Recording Precinct, Alaska, described as follows, to wit:

Commencing at the SE. corner of Lot one (1), which is also the SW. corner of Lot two (2), in Block three (3), thence N. 44° W. 3.6 feet; thence S. $17^{\circ} 55'$ E. to the south end line of said Lot one (1); thence N. $57^{\circ} 52'$ E. along the south end line of said lot one (1) to the point of beginning.

And that said Emery Valentine be ordered and directed to convey the said piece or parcel of land to this defendant by deed properly executed for that purpose.

(2) That the plaintiff herein, Emery Valentine, be adjudged and decreed a trustee, holding in trust for the use and benefit of this defendant, J. J. McGrath, that certain piece and parcel of land situated in the townsite of Juneau, Juneau Recording Precinct, District of Alaska, described as follows, to wit:

Commencing at a point on the dividing line between lots two (2) and three (3), in Block three (3), 11.1 feet S. [33] of the NE. corner of lot two (2) and NW. corner of said lot three (3); thence S. $59^{\circ} 09'$ W. 18.5 feet to the NW. corner of McGrath residence building; thence S. $30^{\circ} 51'$ E. 24.2 feet to the SW. corner of said building; thence N. $29^{\circ} 08'$ W. 23.3; thence N. $60^{\circ} 52'$ E. 17.1 feet to the dividing line between said Lots two (2) and three (3); thence N. 44° W. to the place of beginning.

—and that said Emery Valentine be *order* and di-

rected by this Honorable Court to convey to this defendant the said premises by good and sufficient deed for that purpose properly executed.

(3) That plaintiff, Emery Valentine, be adjudged and decreed to be a trustee, holding in trust for the use and benefit of this defendant, the following tract or parcel of land situated in the townsite of Juneau, Juneau Recording Precinct, District of Alaska, described as follows, to wit:

Commencing at the SW. corner of Lot three (3), the same being the SE. corner of Lot two (2), in Block three (3), thence N. 44° E. along the boundary line between said Lot two (2) and three (3) 88.9 feet to the north end of said "McGrath house"; thence N. 59° 09' E. a distance of 10 feet to the NE. corner of said McGrath building; thence southeasterly to the point of beginning.

—and that said Emery Valentine be ordered and directed by this Honorable Court to convey to this defendant the said tract by deed for that purpose properly made and executed.

(4) That that certain deed executed January 14, 1901, to this defendant, by Thomas R. Lyons, as trustee, and recorded on page 295, of Book 13 of Deeds, in the office of the Recorder of Juneau Recording Precinct, Alaska, be reformed so that the description of the property conveyed by said deed be made to read as follows, to wit:

All that portion of Lot one (1), in Block "G," and Lots one (1), two (2), and three (3), in Block three (3), described by metes and bounds as follows: Commencing at the point on the north side line of Front

Street whence west corner of Block 'G' and SW. corner of Lot one (1), in Block three (3), bears N. $83^{\circ} 04' W.$ 51.8 feet distant; thence N. $17^{\circ} 55' W.$ 92.1 feet; thence N. $30^{\circ} 51' W.$ 31.3 feet; thence N. $59^{\circ} 09' E.$ 28.5 feet to the NE. corner of the building occupied by the defendant, known as the "McGrath house"; [34] thence S. $37^{\circ} 35' E.$ 87.17 feet to the SW. corner of Lot three (3), in Block three (3); thence S. $16^{\circ} 46' E.$ 68.8 feet to the north side line of Front Street; thence along the north side line of Front Street N. $83^{\circ} 04' W.$ 53.5 feet to the point of beginning.

(5) That this defendant be decreed and adjudged by this Honorable Court to be the sole owner in fee of all that tract and premises of land described in paragraph one (1) of the second cause of action, and specifically set out in section 4 of this prayer for relief, and that plaintiff herein has no right, title or interest in or to any part or portion of said premises.

(6) That the trial of the issues under the various causes of action in plaintiff's complaint set out and all the proceedings thereunder be abated and stayed until the issues raised and allegations set out in this defendant's cross-complaint be heard, tried and fully adjudicated by this Court.

(7) That this plaintiff have such other and further relief in the premises as to this Honorable Court may seem just, fit and proper and that this defendant have his costs and disbursements herein.

LEWIS P. SHACKLEFORD, and
JOHN RUSTGARD,

Attorneys for Defendants. [35]

Exhibit "A" [to Cross-Complaint].

THIS INDENTURE, made this 14th day of January, in the year of our Lord one thousand nine hundred and one, by and between Thomas R. Lyons as trustee for the townsite of Juneau, in the Territory of Alaska, party of the first part, and John J. McGrath, of Juneau, in the District _____, and _____, of Alaska, party of the second part, witnesseth:

WHEREAS, said party of the first part has been appointed trustee for said townsite by the Secretary of the Interior, under the provisions of sections 11 and 15 inclusive, of the Act of Congress approved March 3, 1891, entitled "An Act to repeal timber-culture laws, and for other purposes," (26 Stats., 1905), and

WHEREAS, pursuant to said appointment as such trustee, said party of the first part has duly qualified and entered upon the performance of his duties, as such, as provided in said act and the regulations of the Secretary of the Interior, dated June 3, 1891, for his guidance, and

WHEREAS, on the 13th day of October, A. D. 1893, said party of the first part, as such trustee, entered the tract of land upon which the townsite of Juneau is situate being survey No. 1, of public surveys in Alaska, under said act, executed by Geo. W. Garside, United States deputy surveyor, under instructions from the United States Marshal, ex-officio surveyor-general of Alaska, bearing date of the 8th day of March, 1892, approved by said United States marshal, ex-officio surveyor-general, on the 21st day of October, 1892, and

WHEREAS, said trustee has entered said land in trust for the several use and benefit of the occupants thereof, according to their respective interests, and has made survey thereof into lots, blocks, squares, streets, and alleys, and has assessed upon each of the lots in said townsite the sums of money contemplated by the instructions of the Secretary of the Interior, and [36]

WHEREAS, said trustee finds that according to the true spirit and intent of said act that said party of the second part is interested in said townsite and entitled to the premises thereon as hereinafter described, and

WHEREAS, said party of the second part has paid the assessments upon said property amounting to the sum of seventy-two dollars.

NOW, THEREFORE, said party of the first part, as such trustee, by virtue of the power vested in and conferred upon him by the terms of said act, and in consideration of said sum, the receipt of which is hereby acknowledged, by these presents does grant, convey, and confirm unto the said party of the second part and his heirs and assigns all the following lot, piece, and parcel of land situate in the town of Juneau, and Territory of Alaska, described as follows, to wit:

All that portion of lot one (1) Block "G" and lot two (2) Block three, described by metes and bounds as follows: Beginning at a point on Front Street, whence initial Corner bears north $83^{\circ} 4'$ west 51.8 feet; thence South $57^{\circ} 52'$ West, 234 feet distant; thence North $17^{\circ} 55'$ west 92.1 feet; thence North

29° 8' West 30.3 feet; thence North 60° 52' east 18.1 feet; thence South 44° east 87.4 feet; thence South 16° 46' east 68.8 feet; thence North 83° 4' west 53.5 feet to point of beginning

To have and to hold the same, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, forever.

IN WITNESS WHEREOF, said party of the first part, as such trustee, has hereunto set his hand and seal on the day and year first above written.

THOMAS R. LYONS, [Seal]

Trustee for the Townsite of Juneau, Alaska Territory.

In presence of

T. J. DONOHOE.

ROSE MILLER. [37]

Territory of Alaska:

Be it remembered, that on this 14th day of January, A. D. ———, before me, a Notary Public, came Thomas R. Lyons to me personally known to be the trustee of said townsite of Juneau, Alaska, and the identical person described in, and whose name is affixed to, the foregoing conveyance as grantor, and he acknowledges the execution of the same to be his voluntary act and deed as such trustee, for the uses and purposes therein mentioned.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal on the day and year first above written.

[Seal]

T. J. DONOHOE,
Notary Public. [38]

Exhibit "B" [to Cross-Complaint].

THIS INDENTURE, made this 13th day of July, in the year of our Lord one thousand eight hundred and ninety-eight, by and between Thomas R. Lyons as trustee for the townsite of Juneau, in the Territory of Alaska, party of the first part, and Emery Valentine of Juneau, in the District ———, and ———, of Alaska, party of the second part, witnesseth:

WHEREAS, said party of the first part has been appointed trustee for said townsite by the Secretary of the Interior, under the provisions of sections 11 and 15 inclusive, of the act of Congress approved March 3, 1891, entitled "An act to repeal timber-culture laws, and for other purposes" (26 Stats., 1905), and

WHEREAS, pursuant to said appointment as such trustee, said party of the first part has duly qualified and entered upon the performance of his duties, as such, as provided in said act and the regulations of the Secretary of the Interior, dated June 3, 1891, for his guidance, and

WHEREAS, on the 13th day of October, A. D. 1893, said party of the first part, as such trustee, entered the tract of land upon which the townsite of Juneau is situate being survey No. 1, of public surveys in Alaska, under said act, executed by Geo. W. Garside, United States deputy surveyor, under instructions from the United States marshal, ex-officio surveyor-general of Alaska, bearing date of the 8th day of March, 1892, approved by said United

States marshal, ex-officio surveyor-general, on the 21st day of October, 1892, and

WHEREAS, said trustee has entered said land in trust for the several use and benefit of the occupants thereof, according to their respective interests, and has made survey thereof into lots, blocks, squares, streets, and alleys, and has assessed upon each of the lots in said townsite the sums of money contemplated by the instructions of the Secretary of the Interior, and [39]

WHEREAS, said trustee finds that according to the true spirit and intent of said act that said party of the second part is interested in said townsite and entitled to the premises thereon as hereinafter described, and

WHEREAS, said party of the second part has paid the assessments upon said property amounting to the sum of forty-eight dollars.

NOW, THEREFORE, said party of the first part, as such trustee, by virtue of the power vested in and conferred upon him by the terms of said act, and in consideration of said sum, the receipt of which is hereby acknowledged, by these presents does grant, convey, and confirm unto the said party of the second part and his heirs and assigns all the following lot, piece, and parcel of land situate in the town of Juneau, and Territory of Alaska, described as follows, to wit:

Lot One (1) in Block three (3) as per the office plat *thereof*.

To have and to hold the same, together with all and singular the tenements, hereditaments and appur-

tenances thereunto belonging, or in anywise appertaining, forever.

IN WITNESS WHEREOF, said party of the first part, as such trustee, has hereunto set his hand and seal on the day and year first above written.

THOMAS R. LYONS, [Seal]

Trustee for the townsite of Juneau, Alaska Territory.

In presence of

T. J. DONOHOE.

ROSE MILLER. [40]

Territory of Alaska.

Be it remembered, that on this 20th day of July, A. D. 1898, before me, a Notary Public, came Thomas R. Lyons to me personally known to be the trustee of said townsite of Juneau, Alaska, and the identical person described in, and whose name is affixed to, the foregoing conveyance as grantor, and he acknowledges the execution of the same to be his voluntary act and deed as such trustee, for the uses and purposes therein mentioned.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal on the day and year first above written.

[Seal]

JOHN G. HEID, [Seal]

Notary Public. [41]

Exhibit "C" [to Cross-Complaint].

THIS INDENTURE, made this 14th day of July, in the year of our Lord one thousand eight hundred and ninety-eight, by and between Thomas R. Lyons as trustee for the townsite of Juneau, in the Territory of Alaska, party of the first part, and Emery

Valentine of Juneau, in the District ———, and
———, of Alaska, party of the second part, witnesseth:

WHEREAS, said party of the first part has been appointed trustee for said townsite by the Secretary of the Interior, under the provisions of sections 11 and 15 inclusive, of the act of Congress approved March 3, 1891, entitled "An act to repeal timber-culture laws, and for other purposes," (26 Stats., 1905), and

WHEREAS, pursuant to said appointment as such trustee, said party of the first part has duly qualified and entered upon the performance of his duties, as such, as provided in said act and the regulations of the Secretary of the Interior, dated June 3, 1891, for his guidance, and

WHEREAS, on the 13th day of October, A. D. 1893, said party of the first part, as such trustee, entered the tract of land upon which the townsite of Juneau is situate being survey No. 1, of public surveys in Alaska, under said act, executed by Geo. W. Garside, United States deputy surveyor, under instructions from the United States marshal, ex-officio surveyor-general of Alaska, bearing date of the 8th day of March, 1892, approved by said United States marshal, ex-officio surveyor-general, on the 21st day of October, 1892, and

WHEREAS, said trustee has entered said land in trust for the several use and benefit of the occupants thereof, according to their respective interests, and has made survey thereof into lots, blocks, squares, streets, and alleys, and has assessed upon each of the

lots in said townsite the sums of money contemplated by the instructions of the Secretary of the Interior, and [42]

WHEREAS, said trustee finds that according to the true spirit and intent of said act that said party of the second part is interested in said townsite and entitled to the premises thereon as hereinafter described, and

WHEREAS, said party of the second part has paid the assessments upon said property amounting to the sum of Forty-eight dollars.

NOW, THEREFORE, said party of the first part, as such trustee, by virtue of the power vested in and conferred upon him by the terms of said act, and in consideration of said sum, the receipt of which is hereby acknowledged, by these presents does grant, convey, and confirm unto the said party of the second part and his heirs and assigns all the following lot, piece, and parcel of land situate in the town of Juneau, and Territory of Alaska, described as follows, to wit:

Lot three (3) in Block three (3) as per the official plat *thereof*.

To have and to hold the same, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, forever.

IN WITNESS WHEREOF, said party of the first part, as such trustee, has hereunto set his hand and

seal on the day and year first above written.

THOMAS R. LYONS, [Seal]

Trustee for the Townsite of Juneau, Alaska Territory.

In presence of

JOHN G. HEID.

ALFRED E. MALTBY. [43]

Territory of Alaska.

Be it remembered, that on this 20th day of July, A. D. 1898, before me, a Notary Public, came Thomas R. Lyons to me personally known to be the trustee of said townsite of Juneau, Alaska, and the identical person described in, and whose name is affixed to, the foregoing conveyance as grantor, and he acknowledges the execution of the same to be his voluntary act and deed as such trustee, for the uses and purposes therein mentioned.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal on the day and year first above written.

[Seal]

JOHN G. HEID, [Seal]

Notary Public for Alaska. [44]

Exhibit "D" [to Cross-Complaint].

THIS INDENTURE, made this 18th day of July, in the year of our Lord one thousand nine hundred and one, by and between Thomas R. Lyons as trustee for the townsite of Juneau, in the Territory of Alaska, party of the first part, and Emery Valentine of Juneau, in the District ———, and ———, of Alaska, party of the second part, witnesseth:

WHEREAS, said party of the first part has been appointed trustee for said townsite by the Secretary

of the Interior, under the provisions of sections 11 and 15 inclusive, of the act of Congress approved March 3, 1891, entitled "An act to repeal timber-culture laws, and for other purposes," (26 Stats., 1905), and

WHEREAS, pursuant to said appointment as such trustee, said party of the first part has duly qualified and entered upon the performance of his duties, as such, as provided in said act and the regulations of the Secretary of the Interior, dated June 3, 1891, for his guidance, and

WHEREAS, on the 13th day of October, A. D. 1893, said party of the first part, as such trustee, entered the tract of land upon which the townsite of Juneau is situate being survey No. 1, of public surveys in Alaska, under said act, executed by Geo. W. Garside, United States deputy surveyor, under instructions from the United States marshal, ex-officio surveyor-general of Alaska, bearing date of the 8th day of March, 1892, approved by said United States marshal, ex-officio surveyor-general, on the 21st day of October, 1892, and

WHEREAS, said trustee has entered said land in trust for the several use and benefit of the occupants thereof, according to their respective interests, and has made survey thereof into lots, blocks, squares, streets, and alleys, and has assessed upon each of the lots in said townsite the sums of money contemplated by the instructions of the Secretary of the Interior, and [45]

WHEREAS, said trustee finds that according to the true spirit and intent of said act that said party

of the second part is interested in said townsite and entitled to the premises thereon as hereinafter described, and

WHEREAS, said party of the second part has paid the assessments upon said property amounting to the sum of Sixteen dollars.

NOW, THEREFORE, said party of the first part, as such trustee, by virtue of the power vested in and conferred upon him by the terms of said act, and in consideration of said sum, the receipt of which is hereby acknowledged, by these presents does grant, convey, and confirm unto the said party of the second part and his heirs and assigns all the following lot, piece, and parcel of land situated in the town of Juneau, and Territory of Alaska, described as follows, to wit:

Commencing at a point on the dividing line between lots one (1) and two (2) in Block three (3), 3.6 ft., measured on said line from block "G"; thence running in a northwesterly direction on said line a distance of 96.6 ft. to the dividing line between lot one (1) and two (2) and seven (7) and eight (8) in said Block three (3); thence in an easterly direction on said dividing line a distance of 50 feet to the east corner of said lot two (2) block three (3), thence in a southwesterly direction on the dividing line between lots two (2) and three (3) a distance of 12.6 feet, thence south 60 degrees and 52 minutes west 18.1 ft.; thence south 29 degrees and 8 minutes east 30.3 ft.; thence south 17 degrees and 55 minutes west to place of beginning according to the official survey and plat of said Juneau, Alaska, as executed by G. W. Gar-

side and approved by the trustee of the townsite of Juneau.

To have and to hold the same, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, forever.

IN WITNESS WHEREOF, said party of the first part, as such trustee, has hereunto set his hand and seal on the day and year first above written.

THOMAS R. LYONS, [Seal]

Trustee for the Townsite of Juneau, Alaska Territory.

In presence of

J. G. BARBER.

E. J. BROOKS. [46]

Territory of Alaska.

Be it remembered, that on this 18th day of July, A. D. 1901, before me, a Notary Public, came Thomas R. Lyons to me personally known to be the trustee of said townsite of ~~Juneau, Alaska~~, and the identical person described in, and whose name is affixed to, the foregoing conveyance as grantor, and he acknowledges the execution of the same to be his voluntary act and deed as such trustee, for the uses and purposes therein mentioned.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal on the day and year first above written.

[Seal]

ARTHUR L. LOVETT, [Seal]

Notary Public for Alaska. [47]

United States of America,
District of Alaska,—ss.

I, J. J. McGrath being first duly sworn, on oath say: That I am one of the defendants in the above-entitled action; that I have read the foregoing Answer and know the contents thereof and believe the same to be true.

J. J. McGRATH.

Subscribed and sworn to before me this 3d day of January, A. D. 1910.

[Seal]

JOHN RUSTGARD,
Notary Public for Alaska.

Due service of a copy of the within is admitted this 4th day of Jan., 1910.

J. F. MALONY,
Atty. for Plff.

[Endorsed]: Original No. 613-A. In the District Court for the District of Alaska, Division No. 1, at Juneau. Emery Valentine, Plaintiff, vs. J. J. McGrath et al., Defendants. Second Amended Answer. Filed Jan. 5, 1910. H. Shattuck, Clerk. By H. Malone, Deputy. Lewis P. Shackleford, Attorney for Defts. Office: Juneau, Alaska. [48]

[Title of Court and Cause.]

**Reply to Answer and Cross-Complaint of J. J.
McGrath.**

Now comes the plaintiff, by his attorneys, and for reply to the second amended answer of the defendant, J. J. McGrath to the first cause of action, says:

1st. For reply to the second defense to said cause

of action being the plea of the statute of limitation of seven years, he denies all and singular the allegations therein contained.

2d. And for reply to the third defense to said cause of action, plaintiff denies all and singular the allegation therein contained.

And for reply to the answer of the defendant to the second cause of action, plaintiff says:

1st. For reply to the second defense, being the plea of the seven years statute of limitation, to the second cause of action, he denies all and singular the allegations therein contained.

2d. And for reply to the third defense, this plaintiff denies all and singular the allegations therein contained.

And for reply to the answer of J. J. McGrath to the third cause of action alleged, this plaintiff says:

1st. For reply to the second defense to said cause of action, being the plea of the seven years statute of limitation, [49] he denies all and singular the allegations therein contained.

2d. For reply to the third defense to said cause of action, this plaintiff denies all and singular the allegations therein contained.

And for reply to the first cross-complaint of the defendant J. J. McGrath, plaintiff denies and alleges as follows:

I.

Referring to paragraph I thereof plaintiff has no knowledge or information concerning same, and he therefore, denies all and singular the allegations in said paragraph contained.

II.

Referring to the second paragraph thereof, he denies all and singular the allegations therein contained.

III.

Referring to the fourth paragraph of said cross-complaint, plaintiff admits that on or about December 3d, 1897, he filed his application with the townsite trustee for the town of Juneau, for a deed to all of Lot 1, in Block 3 of the said town of Juneau, but he denies all and singular the other and remaining allegations in said paragraph contained.

IV.

Referring to the fifth paragraph of said cross-complaint, plaintiff admits that on or about July 13th, 1898, the said townsite trustee executed his deed conveying to the plaintiff all of Lot 1, in Block 3, of the town of Juneau; but he denies all and singular the other and remaining allegations in said paragraph contained.

V.

Referring to paragraph six of said first cross-complaint, plaintiff denies all and singular the allegations therein contained. [50]

VI.

Referring to the seventh paragraph of said cross-complaint, plaintiff admits that on or about January 3d, 1898, the defendant filed his application with the townsite for a deed to the premises attempted to be described in the first part of said paragraph, and he alleges that said application was rejected by the said townsite trustee because said description was

too indefinite and uncertain to support a deed'; Plaintiff further admits that that defendant thereafter had a surveyor survey the ground or premises claimed by him, and thereafter the said surveyor furnished the defendant with the field-notes of said premises set out in paragraph seven and that thereafter, the defendant filed with the said trustee his application for a trustee's deed to the premises included in said survey. But he denies all and singular the other and remaining allegations in said paragraph contained; and plaintiff alleges:

That he filed a contest before said trustee, protesting against defendant's said application, that a hearing was duly had before said trustee, and after full hearing the premises described in the complaint, and in controversy herein, were expressly excluded from defendant's said application and adjudged to belong to the plaintiff, and said decision has never been reversed, annulled or modified.

VII.

Referring to the eighth paragraph of said cross-complaint, plaintiff admits that on or about January 14th, 1898, and after the decision of the contest mentioned in the next preceding paragraph hereof, the defendant received a deed to a portion of the premises involved in said application of defendant; but plaintiff has no knowledge as to whether the copy of the deed marked Exhibit "A" to the defendant's answer [51] is a correct copy of said deed, and he, therefore, denies the same; and alleges that if the said copy marked Exhibit "A" is a true copy of the original, then the description therein contained

varies from the description of the premises awarded defendant in the decision of the trustee aforesaid in this; that the description contained in said Exhibit "A" embraces a portion of the premises sued for by plaintiff herein while in said decision of said trustee such premises were expressly excluded. And plaintiff denies all and singular the other and remaining allegations in said paragraph contained.

VIII.

Referring to paragraph nine of said cross-complaint, plaintiff admits that his deed to Lot 1, in Block 3 of the town of Juneau, was duly recorded on or about January 14th, 1898; but he denies all the singular the other and remaining allegations in said paragraph contained.

And for reply to the second cause of action for equitable relief of the defendant, J. J. McGrath, plaintiff says:

I.

Referring to the 1st and 2d paragraphs of said second cause of action, plaintiff denies all and singular the allegations contained therein.

II.

Referring to the third paragraph thereof, plaintiff denies the allegation therein made as follows: "And while the defendant was such sole and exclusive occupant of said premises as above set out."

III.

Referring to the fourth paragraph thereof, plaintiff admits that on or about December 3d, 1897, he filed an application [52] with the townsite trustee for the premises described in paragraph 1, of said

second cause of action; but he denies all and singular the other and remaining allegations in said paragraph contained.

And plaintiff further alleges that there was, thereafter, a contest and litigation between the plaintiff and defendant before said townsite trustee, which was duly initiated, tried and determined and the premises described in plaintiff's complaint herein were awarded by said trustee to the plaintiff.

IV.

Referring to paragraph five thereof, the plaintiff admits that on or about July 14th, 1898, the said townsite trustee executed a deed conveying to him all of Lot 3 in Block 3 of the town of Juneau; but he denies all and singular the further and remaining allegations in said complaint contained.

V.

Referring to paragraph six thereof, plaintiff admits that on or about January 3d, 1898, defendant filed his application for a trustee's deed to the premises attempted to be described in the first portion of said paragraph six, but plaintiff alleges that said application was by the said trustee rejected because said description was too indefinite and uncertain to support a conveyance; plaintiff further admits that defendant thereafter procured a surveyor to make a survey of the premises claimed by him, and that such survey was made, and defendant furnished with the field-notes thereof; that on or about the ninth day of December, 1898, the defendant filed his amended application for a deed from said townsite trustee, describing the premises claimed by him in accordance

with the field-notes furnished by said surveyor; plaintiff further admits that said townsite trustee ordered a hearing to determine whether plaintiff or defendant [53] was entitled to a trustee's deed to Lot 2, in Block 3, of said town and how much, if any, each party was entitled to. But plaintiff denies all and singular the other and remaining allegations in said paragraph contained. And plaintiff further alleges that on said hearing, the premises herein sued for and described as portions of Lots 1 and 2 and 3, in Block 3, were by said trustee awarded to the plaintiff.

VI.

Referring to paragraph seven thereof, plaintiff admits that on or about the 14th day of January, 1901, a deed was issued to the defendant by the trustee, pursuant to his decision of said contest between plaintiff and defendant; but he denies all and singular the other and remaining allegations in said paragraph contained.

VII.

Referring to paragraph eight thereof, plaintiff admits that the premises described therein includes all that portion of Lot 3, in Block 3, described in plaintiff's second cause of action, except that portion of the premises described as a portion of Lot 2, in Block 3; and he further admits that his deed of July 14th, 1898, was recorded on July 20th, 1898; but he denies all and singular the other and remaining allegations of said paragraph.

VIII.

Referring to paragraph nine thereof, this plaintiff

admits that pursuant to his decision in the contest between plaintiff and defendant as to the right to the deed to Lot 2, in Block 3, of Juneau, the said trustee did, on or about July 18th, 1901, execute to plaintiff the deed attached to the defendant's answer as Exhibit "D," and that said deed was recorded on July 20th, 1901, in the office of the recorder at Juneau, in Book 13 of Deeds at page 297; but plaintiff denies [54] all and singular the other and remaining allegations in said paragraph contained.

IX.

Referring to paragraph ten thereof, plaintiff admits that he is relying upon his said deeds as evidence of his title to said premises herein sued for, but he denies all and singular the other and remaining allegations in said paragraph contained.

L. V. RAY and
MALONY & COBB,
Attorneys for Plaintiff.

United States of America,
District of Alaska,—ss.

Emery Valentine, being first duly sworn, on oath deposes and says: I am the plaintiff above named. I have read the above and foregoing reply, know the contents thereof and the same is true, as I verily believe.

[Notarial Seal] EMERY VALENTINE.

Subscribed and sworn to before me this the 29th day of January, 1910.

L. V. RAY,
Notary Public in and for Alaska.
Service of the within Reply to Answer of J. J. Mc-

Grath is admitted to have been made by delivery of a copy thereof, this 29th day of January, 1910.

L. P. SHACKLEFORD and
JOHN RUSTGARD,

Attorneys for Defendant J. J. McGrath.

[Endorsed]: Original. No. 613-A. In the District Court for Alaska, Division No. 1, at Juneau. Emery Valentine, Plaintiff, vs. J. J. McGrath and S. Hirsch, Defendant. Filed Jan. 29, 1910. H. Shattuck, Clerk. By H. Malone. Reply to Answer of J. J. McGrath. L. V. Ray, Malony & Cobb, Attorneys for Plaintiff. Office: Juneau, Alaska. [55]

[Title of Court and Cause.]

**Plaintiff's Request for Findings of Fact and
Conclusions of Law.**

This cause came on regularly for trial, and thereupon came the plaintiff by his attorney, J. H. Cobb, and the defendants by their attorney, John Rustgard, and all parties announced ready for trial; and all parties in open court waived a jury and agreed to submit all issues of fact as well as of law to the Court. And the Court, having heard the evidence and argument of counsel thereon, makes the following Findings of Fact:

1. The ground in controversy in this action is a part of the town of Juneau, Alaska, which was entered for patent under the townsite laws upon October 13, 1893; the ground in controversy being portions of Lots 1, 2 and 3 in Block 3, and a portion of Lot 1 of Block G, in said town.

2. On the hearing it was expressly stipulated in open Court by counsel for both sides that any errors in description in the pleadings should be considered as amended to conform to the proof, and the case was heard and tried fully upon the merits.

3. Plaintiff in 1897, shortly after the issuance of patent and after the proper posting and publication of notice by the townsite trustee that his office was ready to proceed to the issuance of deeds under the townsite laws, made his [56] application for deeds to all of Lots 1, 2 and 3 in Block 3, according to the official survey of said town, and to the following described portion of Lot 1, in Block G, to wit: "Beginning at a point on the common boundary line between Lot No. 1, in Block No. 3, and Block G, about 2 feet distant Westerly from the southeast corner of said Lot No. 1; thence southerly 33.7 feet to a point on the south boundary line of said Block G 51.8 feet easterly from the west corner of said Block G; thence westerly along the south boundary line of said Block G 51.8 feet to the westerly corner of said Block; thence along the common boundary line Lot No. 1, in Block No. 3, and Block G, to the point of beginning.

4. On the 3d day of January, 1898, and before the issuance of any deed to the plaintiff, the defendant J. J. McGrath, made his application before the townsite trustee for a deed to a piece of ground described as follows, to wit: "That certain piece or parcel of land situate, lying and being between Lots 2 and 3, in Block 3, as per Hannan's plot, said piece or parcel of land fronting on the waterfront of said Town of Juneau and being 60 feet in width on said waterfront

street and extending back a distance of 100 feet and being 24 feet in width on or at the rear end or line of said described piece or parcel of land.”

5. The above and foregoing description is an imperfect description and is incapable of identification on the ground, and the townsite trustee, proceeding regularly upon the application of the plaintiff, thereafter on or about the 14th day of July, 1898, issued a deed to plaintiff, conveying to him all of Lot 1, in Block 3, and all of Lot 3, in Block 3, and the defendant never filed any contest against the application of the plaintiff for said Lots 1 and 3, in Block 3. [57]

6. The defendant, McGrath's, application, as above made, was contested by the plaintiff, Valentine, before the townsite trustee and the contest was heard upon the plaintiff's application for the premises in Block G, described above, and his application for Lot 2, in Block 3, and the defendant, McGrath's, application for the premises attempted to be described in his application; and on December 9, 1898, the defendant was required by the trustee to file, and did file, an amended application, which is set out in the defendant, McGrath's, cross-complaint. Said contest was regularly heard and voluminous evidence introduced and, after a full hearing, the plaintiff, Valentine, was awarded the following described portion of Lot 2, in Block 3, to wit: “Commencing at a point on the dividing line between Lots One (1) and Two (2), in Block Three (3) 3.6 feet measured on said line from Block G; thence running in a north-westerly direction on said line a distance of 96.6 feet to the dividing line between Lots One (1) and Two

(2) and Seven (7) and Eight (8), in said Block Three (3); thence in an easterly direction on said dividing line a distance of 50 feet to the east corner of said Lot Two (2), in Block Three (3); thence in a westerly direction on the dividing line between Lots Two (2) and Three (3), a distance of 12.6 feet; thence south $60^{\circ} 52' 18.1$ feet, thence south $29^{\circ} 8'$ east 30.3 feet; thence south $17^{\circ} 55'$ west to place of beginning, according to the official survey and plat of said Juneau, Alaska, as executed by G. W. Garside and approved by the trustee of the townsite of Juneau." Said trustee made his deed to Valentine for said premises on the 18th day of July, 1901, and on the 18th day of July, 1901, he executed to Emery Valentine his [58] deed for the following described portion of Lot 1, in Block G, to wit:

Beginning at the southwest corner of Lot One (1) in Block Three (3); thence in a southeasterly direction on the Northerly line of Front Street a distance of 51.8 feet; thence north $17^{\circ} 55'$ west to the dividing line between said Block Three (3) and Block G. Thence in a southwesterly direction on the dividing line between said Block Three (3) and Block G to the place of beginning. The defendant, McGrath, was awarded all the remaining portion of Lot No. 2, in Block 3, and a portion of Lot 1, in Block G, not in controversy in this suit. The plaintiff, Valentine, appealed from said decision of the townsite trustee, but the decision of the trustee was affirmed on appeal by the Secretary of the Interior.

7. The property in controversy in this suit is more particularly shown upon the plat hereto attached

and made a part hereof, and being the portions colored in red on said plat except that portion so colored in Block "G"; and said premises are described by field-notes as follows:

First: A portion of Lot One (1) in Block No. Three (3).

Beginning at the Southeasterly corner of said Lot No. One (1) at the Southwesterly corner of Lot No. Two (2) in Block No. Three (3); Thence N. 44° W. on the dividing line between said Lots One and Two in Block Three a distance of 3.3 feet; thence Southerly 3.3. feet to a point on the south boundary line of said Lot One in Block Three, 1.5 distant from the Southeast corner of same, identical point of beginning; thence along the southerly boundary line of said Lot One in Block Three to the place of beginning.

Second: A portion of Lot No. Two (2) in Block No. Three (3), and a portion of Lot No. Three (3) in Block No. Three (3).

Beginning at a point on the common boundary line between said Lots Nos. 2 and 3 Block 3, 11.1 distant from the NE. corner of Lot 2, and the NW. corner of Lot 3; Thence N. $59^{\circ} 9'$ E. 10 feet more or less to the corner of the building occupied by the defendants; thence S. $30^{\circ} 31'$ E. 24.2 feet to the SE. corner of said building; thence S. $59^{\circ} 9'$ W. 2.4 feet more or less to the intersection of the common boundary line between said Lots 2, and 3 in Block 3; [59]

Thence N. 44° W. along said line 23.3 feet to a point on said line 12.6 feet distant from the NE. corner said Lot 3 in Block 3;

Thence S. $60^{\circ} 52'$ W. 18.1 feet; thence S. $29^{\circ} 8'$ E. 30.3 feet;

Thence No. $30^{\circ} 51' W.$ 24.2 feet to the corner of the building occupied by the defendants; thence N. $59^{\circ} 9' E.$ along the north line of said building to the place of Beginning.

Third: A portion of Lot No. Three (3) in Block No. Three (3).

Beginning at a point on the common boundary line between Lots 2 and 3 in Block No. 3 29.6 feet distant from the SW. corner of said Lot 3, and the SE. corner of said Lot 2; thence N. $70^{\circ} 6' E.$ 3.8 feet; thence N. $19^{\circ} 54' W.$ 3.3 feet; thence S. $70^{\circ} 6' E.$ 3.8 feet; thence N. $19^{\circ} 54' W.$ 3.3 feet; thence S. $70^{\circ} 6' W.$ 5.2 feet to the intersection of said line between said Lots 2 and 3; thence S. $44^{\circ} E.$ along said line to the place of Beginning.

8. The failure of the defendant, McGrath, to file a contest over the application of the plaintiff for deeds to Lots 1 and 3, in Block 3, was due to no act or omission on part of the plaintiff but appears to have been due solely to the negligence of the defendant, McGrath.

9. The contest between McGrath and the plaintiff, Valentine, over Lot 2, in Block 3, was fairly and fully heard, and there is no evidence of a mistake on part of the trustee in the conclusions arrived at.

10. The Court further finds that there is a two-story building costing about Four Thousand Dollars (\$4,000.00) standing upon the defendant's ground, and which encroaches upon and covers that portion of Lot 1, in Block One (1) in controversy herein; that at the time of the erection of the building no notice was given by the owner of this small encroachment

but the building was permitted to be completed without objection. Under these circumstances the Court finds it inequitable to award this ground to the plaintiff and allow him to chop a hole in the side of a valuable building, and materially damage and disfigure it, but plaintiff is entitled to recover the value of this piece of ground, and upon the payment of such value by the defendant he is entitled to an injunction against plaintiff, or [60] a conveyance.

11. The rental value of that portion of the ground awarded plaintiff is Ten Dollars (\$10.00) for the entire time it has been withheld by the defendant.

12. The defendant, S. Hirsch, is a tenant of McGrath and holding under him, and has no other interest in the premises.

From the above and foregoing facts, I conclude as matter of law—

1. That plaintiff is the legal and equitable owner of the premises in controversy, holding the same under patent from the United States to the townsite trustee and deeds from the townsite trustee to himself, and is entitled to recover the same with nominal rental thereof, to wit \$10.00.

2. The defendant, McGrath, is concluded by the award of the townsite trustee from any claim in the premises in controversy.

3. The plaintiff is holding from and under the United States and the seven years statute of limitations plead by the defendant is not applicable, since it would in effect be to plead the same against the United States. I further conclude that the defendant, McGrath, is not holding the premises in contro-

versy under any color of title.

4. The ten years statute of limitations plead by the defendant, McGrath, did not run at the time of the beginning of this action since the statute did not begin to run against the plaintiff until he received his deeds. The plaintiff is entitled to judgment against both defendants for restitution of the premises in controversy, excepting that portion of Lot One (1) in Block One (1), and against McGrath for the rental value thereof, amounting now [61] to the sum of Ten Dollars (\$10.00); and a judgment that the defendant, McGrath, take nothing by his cross-complaints.

5. It is further ordered that the plaintiff be and he is hereby enjoined from entering upon that portion of Lot One (1) in Block One (1) described in the first cause of action and in these findings, but will be allowed sixty (60) days within which to institute a suit for its value and damages, if any, to the remainder of the tract, which issue may be proved in this suit, and jurisdiction retained for that purpose, or an independent suit be instituted by plff., as plaintiff may elect, and the injunction to remain in effect until sixty (60) days after the return unsatisfied of an execution upon any money judgment that may be recovered and the further order of the Court.

6. Each party will pay their own costs herein.

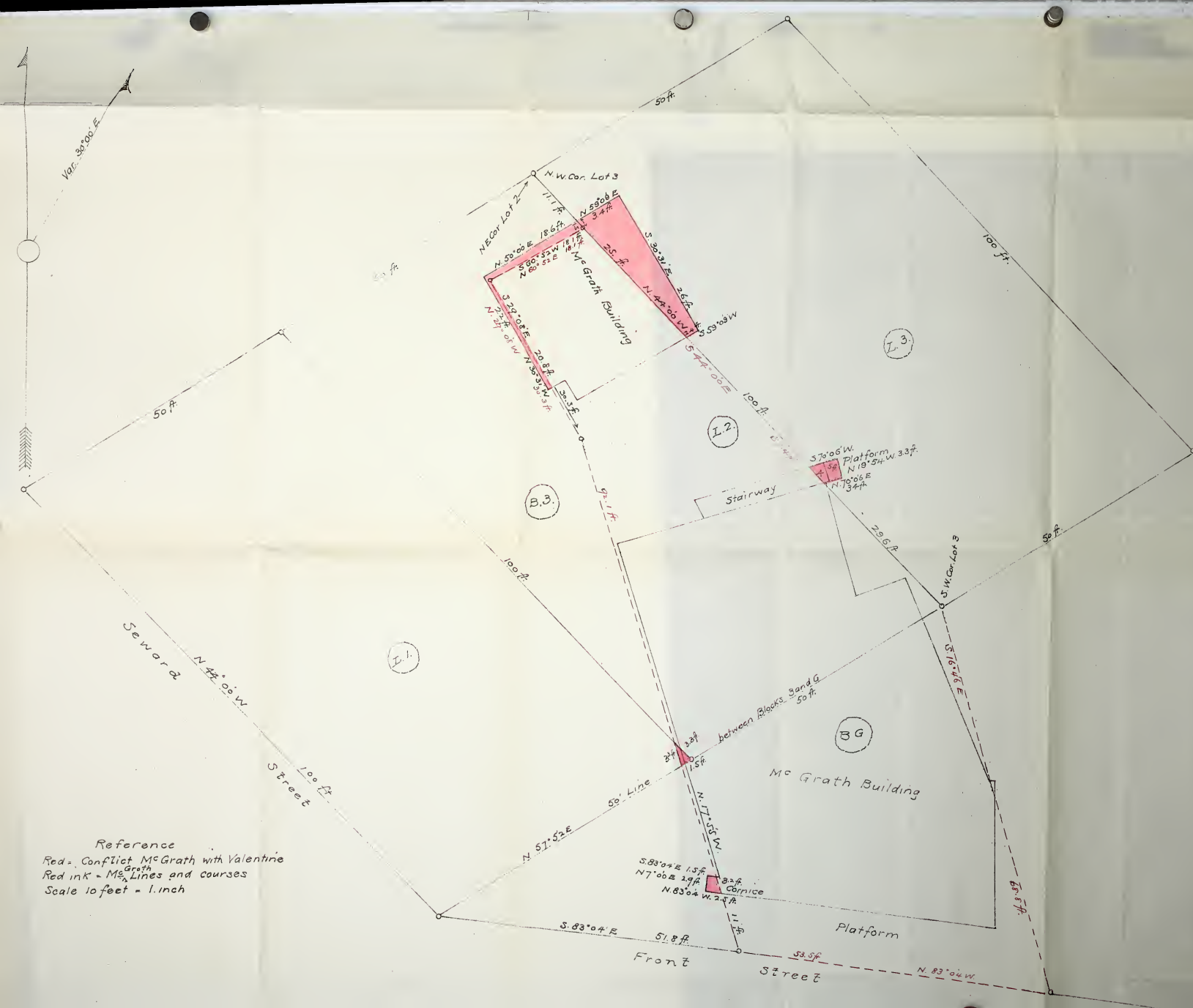
Let a judgment enter accordingly.

Dated, June 16th, 1910.

EDWARD E. CUSHMAN,

Judge.

[Endorsed]: Original No. 613-A. In the District Court for Alaska, Division No. 1, at Juneau. Emery Valentine, Plaintiff, vs. J. J. McGrath and S. Hirsch, Defendants. Findings of Fact and Conclusions of Law. Filed Jun. 16, 1910. H. Shattuck, Clerk. By _____, Deputy. Malony & Cobb, Attorneys for Plff. Office: Juneau, Alaska. [62]



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[Title of Court and Cause.]

Judgment.

THIS CAUSE came on to be heard, and thereupon came the plaintiff by his attorneys, and the defendants by their attorneys, and all parties announced ready for trial and thereupon all parties in open court expressly waive a jury and agree to submit all questions of fact as well as of law to the Court; and the Court having heard the evidence and argument of counsel thereon, and having heretofore filed findings of fact and conclusions of law herein, now upon motion of the plaintiff for judgment upon such findings and conclusions;

It is considered by the Court and so ORDERED AND ADJUDGED that the plaintiff, Emery Valentine, do have and recover of and from the defendants, J. J. McGrath and S. Hirsch, the possession of the following described property, to wit: Situated in the District of Alaska, and in the Town of Juneau, and being part of Lot No. 2 in Block 3, and a part of Lot No. 3 in Block No. 3 of the Town of Juneau, Alaska, and bounded as follows: Beginning at a point on the common boundary line between said Lots Nos. 2 and 3 in Block 3 11.1 feet distant from the NE. corner of Lot No. 2 and the NW. corner of Lot No. 3; thence N. $59^{\circ} 9' E.$ 10 feet more or less to the corner of the building occupied by the defendants; thence S. $30^{\circ} 31' E.$ 24.2 feet to the SE. corner of said [63] building; thence S. $59^{\circ} 9' W.$ 2.4 feet more or less to the intersection of the common boundary line between said Lots Nos. 2 and 3 in Block No. 3; thence No. 44°

W. along said line 23.3 feet to a point on said line 12.6 feet distant from the NE. corner of said Lot No. 2 in Block No. 3; thence S. $60^{\circ} 52'$ W. 18.1 feet; thence S. $29^{\circ} 8'$ E. 33.3 feet; thence N. $30^{\circ} 51'$ W. 24.2 feet to the corner of the building occupied by the defendants; thence N. $59^{\circ} 9'$ E. along the north line of said building to the place of beginning.

ALSO the following portion of said Lot No. 3 in Block No. 3: Beginning at a point on the common boundary line between said Lots Nos. 2 and 3 in Block No. 3, 29.6 feet distant from the SW. corner of said Lot No. 3 and the SE. corner of said Lot No. 2; thence N. $70^{\circ} 6'$ E. 3.8 feet; thence $19^{\circ} 54'$ W. 3.3 feet; thence S. $70^{\circ} 6'$ W. 5.2 feet to the intersection of said line between said Lots Nos. 2 and 3; thence S. 44° E. along said line to the place of beginning.

It is FURTHER ORDERED AND ADJUDGED that the plaintiff, Emery Valentine, do have and recover of and from the defendant J. J. McGrath the sum of Ten Dollars (\$10.00), with interest thereon from the date hereof at the rate of eight per cent (8%) per annum;

It is FURTHER ORDERED that the parties hereto respectively pay their own costs herein;

It is FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff, Emery Valentine, be and he is hereby enjoined from claiming or entering into possession, or attempting to enter into possession of the following described portion of Lot No. 1 in Block No. 3 of the said town of Juneau, to wit: Beginning at the southeasterly corner of said Lot No. 1 and the southwesterly corner of Lot No. 2 in

Block No. 3, thence N. 44° W. on the dividing line between said Lots Nos. 1 and 2, a [64] distance of 3.3 feet; thence southerly 3.3 feet more or less to a point on the south boundary line of said Lot No. 1, 1.5 feet distant from the southeast corner of the same; thence along the southerly boundary line of Lot No. 1 in Block No. 3, to the place of beginning;

It is FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff may at any time within sixty (60) days from the date hereof file a supplementary complaint herein alleging the value of the premises last described, and the damage, if any, to the rest of the plaintiff's premises by the awarding of the same to the defendant McGrath, or, within the said period, may file another action to recover such value and damages, and, upon issue joined thereon, the plaintiff shall be awarded the value of the said premises, whereupon the injunction herein granted to the defendant McGrath shall be made perpetual, and jurisdiction is retained of the case herein for the purpose of determining said issue, if the plaintiff shall elect to try the same in this suit.

It is FURTHER ORDERED that the plaintiff, Valentine, may have a writ of restitution for the premises herein awarded to him and execution for the moneys awarded.

Dated this the 21st day of June, 1910.

EDWARD E. CUSHMAN,

Judge.

Defendant McGrath excepts. Exception allowed.

EDWARD E. CUSHMAN,

Judge.

[Endorsed]: Original. No. 613-A. In the District Court for Alaska, Division No. 1, at Juneau. Emery Valentine, Plaintiff, vs. J. J. McGrath and S. Hirsch, Defendants. Judgment. Filed Jun. 21, 1910. H. Shattuck, Clerk. By H. Malone, Deputy. Malony & Cobb, Attorneys for Plff. Office: Juneau, Alaska. [65]

[Title of Court and Cause.]

Statement of Evidence and Bill of Exceptions.

Be it remembered, that the above-entitled cause came on duly and regularly to be heard on Friday, the 18th day of March, 1910, before the Honorable Edward E. Cushman, Judge of said Court:

The plaintiff herein being represented by his attorneys and counsel, Messrs. Malony & Cobb:

The defendants herein before represented by their attorneys and counsel, L. P. Shackelford, Esq., and John Rustgard, Esq.:

An opening statement was made to the Court on behalf of the plaintiff by Mr. Cobb and an opening statement on behalf of the defendants by Mr. Rustgard:

Whereupon the following proceedings were had and done: [66]

[Testimony of Emery Valentine, the Plaintiff, in His Own Behalf.]

EMERY VALENTINE, the plaintiff, called and sworn as a witness in his own behalf, testified as follows:

Direct Examination.

(By Mr. COBB.)

Q. What is your name? A. Emery Valentine.

Q. Where do you reside? A. Juneau, Alaska.

Q. How long have you resided here?

A. Twenty-three years.

Q. You are the plaintiff in this case?

A. Yes, sir.

Q. Are you a property owner in Juneau?

A. Yes, sir.

Q. Just state to the Court the extent or experience you have had in renting property since you have been in Juneau, either for yourself or other people?

A. Why, I have been renting a great deal of property since I have been here and collected rentals as much as a thousand dollars per month at times on my own property.

Q. Different tracts of property?

A. Different tracts of property, yes, and as agent for other people in the collection of rents.

Q. You know the reasonable rental value of property in Juneau? A. I think I do.

Q. I want you to state what in your best judgment would be the reasonable rental value of the property belonging to you that is included in your deeds that is encroached upon by the defendant McGrath's possession?

(Testimony of Emery Valentine.)

(Question withdrawn.)

Q. You know where the property in controversy in this city is? [81] A. I do.

Q. Do you know the reasonable rental value of property situated where this is, that section of the town?

A. I think I do; I have rented it there for a number of years or for a good many years.

Q. What has been the reasonable rental value per front foot, along on Front Street there?

A. I rented this part out here on Seward Street (indicating)—

Q. Corner Seward and Front?

A. All of the front part of Lot 1; I rented that at 75¢ per foot per month and this part down here (indicating) I rented that at a dollar per month, and this part (indicating) I had all of this leased out for a number of years.

Q. What then would be in your judgment the value, the monthly rental value, of that little jog there in Lot 1, Block G, and state to the Court further just what you base it upon?

A. I would base the other at 75¢ per foot per month, that is as low as I have rented any of that ground out there.

Q. That occupies something like 2 feet?

A. A foot and a half.

Q. And you ask a dollar for it? A. Yes, sir.

Q. State in what way that interferes with the rest.

A. We couldn't rent such a small place; we couldn't run over here; we were offered a big sum

(Testimony of Emery Valentine.)

of money to build a place here for a restaurant, there where the ground conflicts.

Q. You really have been deprived then of the use of the front along here (indicating) extending the depth of that jog? A. Yes, sir.

Q. Now, how long has the plaintiff been in possession of that, [82] was he in possession of it in May, 1901, six years before the beginning of this suit?

A. Yes, sir.

Q. And has been in possession ever since?

A. Yes, sir.

Q. What then is your estimate of the value, of the rental value per month, of that piece of ground that the plaintiff has deprived you of possession in Lot 1 Block G? A. I said 75¢ per front foot.

Q. I am asking you about that jog, what that is worth?

A. Of course, that interferes as I stated from putting this building here and running it back—it interferes with it that much that I couldn't put the building there that I recently had an offer for. I consider taking out that much the same as taking it along because it deprives me of the whole length of the lot there.

Q. Then you say it was worth at least one dollar a month during that time? A. Yes, sir.

Q. Now, what is the reasonable rental value of that portion of the ground that is covered by McGrath's building that is in your lots, in Lot 2 and Lot 3 in Block 3, that is that collar-shaped piece of ground at the back end of the McGrath building?

(Testimony of Emery Valentine.)

A. That piece of ground occupied by the building is worth about \$15 a month; the building is, I guess, nearly half on my ground.

Q. Well, from your knowledge of it what would you say was the reasonable rental value of the part of the ground covered?

A. That is my part of the ground covered? [83]

Q. Yes.

A. I think about half of \$15, about \$7.50 per month.

Q. Now, in regard to that little jog there on Lot 3, about two-thirds of the way down from the northerly end of it, that is a piece of ground $3\frac{1}{2}$ feet wide by 5 feet—what is the rental value of that?

A. That stands just about the same as this part because it deprives me of the use of this front part of Lot 3; I would have to come out way around that thing there,—that would run into the hotel back here.

Q. And it really prevented you from building there?

A. Yes, it prevented me using Lot 3 there as I wanted to.

Q. You think a dollar per month is a reasonable rental value for that?

A. I would rather have it than have one dollar per month a good deal.

Cross-examination.

(By Mr. RUSTGARD.)

Q. You think it is worth about a dollar per month to McGrath to extend his corners that much on your ground? As shown on Defendant's Exhibit 1?

(Testimony of Emery Valentine.)

A. I don't understand.

Q. This projection shown on Defendant's Exhibit 1, marked "Cornice," that in fact represents the cornice of McGrath's building?

A. This part here of Lot 1?

Q. I refer to the cornice—what do you consider it worth to have the right or permission to extend that cornice over on the property as it is shown?

A. It would be just the same as that if I could use that. [84]

Q. Answer my question—what would you say was the rental value of that?

A. I don't know what the cornice is worth there. I never leased out ground for a cornice.

Q. What in your estimation is that worth?

A. I am not going to estimate because I never rented it out for that.

Q. Then, you don't know the rental value of that?

Q. I wouldn't put any rental value with the cornice hanging over there, no.

Q. Did you make a statement as to what the rental value was on that part of the southeast corner of Lot 1, Block 3 covered by the McGrath building?

A. Yes, what I had always got for that ground.

Q. How much?

A. About 75¢ per front foot.

Q. How much is that building there on your ground?

A. I am not a surveyor; you will have to ask the surveyor for that.

Q. What do you base your estimate on when you

(Testimony of Emery Valentine.)

say it is worth 75¢ a month?

A. Because I said that was what I had always rented that ground for and that I had rented it at one time—the whole thing was rented out—

Q. For 75¢ per front foot? A. Yes, sir.

Q. Have you ever rented anything by the square foot?

A. By the front foot, this and that (indicating).

Q. Do you charge up for the rental value of that corner as much as if the building extended over on your property [85] clear through to the rear?

A. It deprives me of that much.

Q. That is the theory on which you base your estimate of the value? A. Yes, sir.

Q. You have a stairway right there?

A. Yes, sir.

Q. Right along the wall of the McGrath building?

A. Yes, sir.

Q. And there is a distance of about three and one-half feet between the McGrath building and your building to the west of it? A. Yes, sir.

Q. Approximately? A. Yes, sir.

Q. (By the COURT.) I understand there is an open stairway runs up between the two buildings?

A. On account of his being over on my line my stairway is so very narrow that I can't *even the* upstairs in that building.

Q. How wide is that stairway?

A. About 2 feet at the top.

Q. Your stairway is built flush up against the McGrath building?

(Testimony of Emery Valentine.)

A. Right up against the McGrath building, yes.

Q. How far to the front does your stairway extend along the McGrath building? A. I don't know.

Q. Does it come underneath this cornice?

A. I don't know; I never measured that part of it, I don't know how far near the front it extends.

[86]

Q. Did you testify that the space shown on Defendant's Exhibit 1 as being encroached upon by the McGrath house in the rear part was worth \$15 a month,—what did you say the rental value was of the ground encroached upon by McGrath's house, that is in the rear of the property?

A. You mean my ground?

Q. Yes, what you claim as yours?

A. \$7.50 per month for that; for my part.

Q. You have got a lot of vacant ground here on Lot 3? A. Yes, sir.

Q. How much is that, \$7.50 per month?

A. Because I can't use it on account of that, I couldn't build the sidewalk through from this alley way back into the Central Hotel on account of that, I couldn't build anything because it is cut out.

Q. Do you rent any of this property back here (indicating)? A. Yes, sir.

Q. What do you rent?

A. I have a couple of cabins in there?

Q. What do you get for those cabins?

A. \$5.00 a month.

Q. Cabin and all? A. Yes.

Q. When you figure the rental value of this prop-

(Testimony of Emery Valentine.)

erty do you figure on renting the house or is that only the ground rent?

A. I figure the ground as worth about that much.

Q. The ground alone? A. Yes, sir.

Q. How long have those buildings been there?

[87] A. Which ones?

Q. The rear building, to begin with?

A. This residence of McGrath?

Q. Yes.

A. I don't know, it was there in 1886.

Q. How long has the front building been where it now is?

A. I couldn't tell, I don't know how long it has been there.

Q. Been there twenty years?

A. I said I couldn't tell; it is there, I am satisfied of that, I see it every day.

Q. It may have been there twenty years, it may have been built in 1890, for all you know?

A. I don't know,—it wasn't built at that time, I am quite sure it was built later than that.

Q. How much later?

A. I can't tell you exactly, I won't say what time it was built there.

Q. State approximately to the Court.

A. You have the time there.

Mr. COBB.—We object to this as not proper cross-examination.

Objection sustained.

Plaintiff rests. [88]

[Order Allowing Bill of Exceptions, etc.]

The foregoing statement of evidence and bill of exceptions having been by me examined and found to be true and correct and to contain all the evidence adduced and all the proceedings had upon the trial in the above-entitled cause, the same is hereby allowed, ordered filed and made a part of the record herein.

I further certify that a bill of exceptions identical with the foregoing was filed by the defendant, J. J. McGrath, in the above-entitled cause, in the above-entitled court and division, on the 21st day of June, 1910; that a short bill of exceptions was filed by the plaintiff in the above-entitled cause, in the above-entitled court and division, on the 22d day of July, 1910; that the attorneys for plaintiff and defendant reside in the First Division of the District of Alaska; that from the 20th day of June, 1910, to the first day of January, 1911, the undersigned Judge was absent from the First Division of the said district holding various terms of court in the Third Division of said district; that about the first day of January, 1911, said Judge returned to the First Division; whereupon the settling of the two bills of exception filed as aforesaid was called up; that thereupon the attorney for the defendant McGrath announced that such defendant had abandoned his appeal and that he would withdraw the bill of exceptions theretofore filed; that J. H. Cobb, attorney for the plaintiff, announced that he would press his bill of exceptions for settlement at that time; that thereafter, about the tenth day of January, 1911, the undersigned

Judge left the First Division, District of Alaska, and returned to the Third Division, where he remained until about the 25th of April, at which date he returned to the First Division; that on or about May 29th the attorney for plaintiff called up for settlement his short bill of exceptions; that upon the Court [340] announcing that the certificate prepared by the plaintiff to the effect that the short bill of exceptions contained all the material evidence could not be signed, said counsel asked to have the defendant's bill settled, upon which the defendant objected and the Court granted the defendant permission to withdraw his theretofore filed bill, which was done; that thereafter, upon this third day of June, 1911, the plaintiff tendered the foregoing bill of exceptions.

EDWARD E. CUSHMAN,

Judge.

Dated at Juneau, Alaska, this 3d day of June, 1911.
[341]

United States of America,
District of Alaska,—ss.

I, Jno. R. Winn, one of attorneys for defendants do hereby certify that the above and foregoing is a true, full and correct copy of the original Bill of Exceptions herein.

L. P. SHACKLEFORD,

JNO. R. WINN,

Of Attorneys for Defendant.

[Endorsed]: Copy. No. 613-A. In the District Court for the District of Alaska, Division No. 1, at Juneau. Emery Valentine, Plaintiff, vs. J. J. McGrath and S. Hirsch, Defendants. Bill of Excep-

tions and Statement of Evidence. Filed Jun. 3, 1911. E. W. Pettit, Clerk. By J. J. Clarke, Deputy. Lewis P. Shackelford, Attorney for Defendants. Office: Juneau, Alaska. [342]

[Title of Court and Cause.]

Petition for Writ of Error.

Emery Valentine, plaintiff in the above-entitled and numbered cause, feeling himself aggrieved by the decision and judgment of the Court, rendered herein on the 21st day of June, 1910, comes now, by Malony & Cobb, his attorneys, and petitions the Court for an order allowing a writ of error to be prosecuted to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under the statute in that behalf made and provided, and also that the amount of security for costs on said writ of error be fixed.

MALONY & COBB,
Attorneys for Emery Valentine.

[Order Allowing Writ of Error and Fixing Amount of Security for Costs.]

The writ of error prayed for in the above and foregoing petition is allowed, and the amount of security for costs is fixed at the sum of Two Hundred and Fifty Dollars.

Dated this 3 day of June, 1911.

EDWARD E. CUSHMAN,
Judge of the District Court for Alaska Before
Whom Said Cause was Tried.

[Endorsed]: Original. No. 613-A. In the District Court for Alaska, Division No. 1, at Juneau. Emery Valentine, Plaintiff, vs. J. J. McGrath et al., Defendants. Petition for Writ of Error. Filed Jun. 3, 1911. E. W. Pettit, Clerk. By J. J. Clarke, Deputy. Malony & Cobb, Attorneys for Plff. Office: Juneau, Alaska. [343]

[Title of Court and Cause.]

Assignment of Errors.

Now comes Emery Valentine, plaintiff in error, and assigns the following errors committed by the Court below in the trial and rendition of the judgment in the above-entitled and numbered cause, upon which he will rely in the Appellate Court.

First: The Court erred in not awarding to the plaintiff, Emery Valentine, that portion of Lot No. 1, in Block G, of the town of Juneau, described in the third cause of action in the complaint, and in the second amended answer of the defendant McGrath.

Second: The Court erred in not awarding to the plaintiff, Emery Valentine, that portion of Lot No. 1 in Block No. 3 of the town of Juneau, described in the 1st cause of action in the complaint; and further erred in awarding the same to the defendant, McGrath, conditioned upon his paying any judgment that might be recovered against him for the value of said premises, together with damages for withholding the same in any suit that said Emery Valentine might bring within sixty days against the said McGrath.

Third: The Court erred in not awarding to the plaintiff, Emery Valentine, the sum of \$10.00 per month from May 1st, 1901, to the time of trial, as rentals on the property in controversy.

Fourth: The Court erred in adjudging that each party pay their own costs, and in not adjudging that plaintiff recover costs of the defendants.

And for said errors, the plaintiff in error, Emery Valentine, prays that said judgment be reversed and the cause [344] remanded with instructions as to this Court may seem proper.

J. H. COBB,

Attorneys for E. Valentine Pltff. in Error.

[Endorsed]: Original. No. 613-A. In the District Court for Alaska, Division No. 1, at Juneau. Emery Valentine, Plaintiff, vs. J. J. McGrath et al., Defendants. Assignments of Error. Filed Jun. 3, 1911. E. W. Pettit, Clerk. By J. J. Clarke, Deputy. Malony & Cobb, Attorneys for Plff. Office: Juneau, Alaska. [345]

[Title of Court and Cause.]

Bond on Writ of Error.

Know all men by these presents that we, Emery Valentine as principal, and R. P. Nelson as surety, are held and firmly bound unto J. J. McGrath and S. Hirsch, defendants above named, in the sum of Two Hundred and Fifty Dollars, to be paid to the said J. J. McGrath and S. Hirsch, their executors or administrators, to the payment of which sum, well and truly to be made, we hereby bind ourselves, our and each of our heirs executors and administrators,

jointly and severally, firmly by these presents.

Whereas the above-named plaintiff, Emery Valentine, has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment of the District Court of Alaska, Division No. 1, in the above-entitled cause.

Now therefore, the condition of the above obligation is such that if the above-bound Emery Valentine, shall prosecute said writ to effect, and answer all costs and damages if he shall fail to make good his plea, then *then* this obligation shall be null and void; otherwise to remain in full force and virtue.

Witness our hands this the 1st day of June, 1911.

EMERY VALENTINE.

R. P. NELSON.

The above and foregoing bond is approved, this the 3d day of June, 1911.

EDWARD E. CUSHMAN,

Dist. Judge. [346]

[Endorsed]: Original. No. 613-A. In the District Court for Alaska, Division No. 1, at Juneau. Emery Valentine, Plaintiff, vs. J. J. McGrath et al., Defendants. Bond of Writ of Error. Filed Jun. 3, 1911. E. W. Pettit, Clerk. By J. J. Clarke, Deputy. J. H. Cobb, Attorneys for Plff. Office: Juneau, Alaska. [347]

[Title of Cause.]

Order Extending Time to File Transcript.

Upon application of counsel for plaintiff, the time for filing the transcript of the Record in the Appel-

late Court in this cause is hereby extended to and including August 15th, 1911.

Dated June 3d, 1911.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: No. 613-A. In the District Court for Alaska, Division No. 1, at Juneau. Emery Valentine, Plff., vs. J. J. McGrath et al., Defts. Order Extending Time to File Transcript. Filed Jun. 3, 1911. E. W. Pettit, Clerk. By J. J. Clarke, Deputy. J. H. Cobb, Atty. for Plff. [348]

[Title of Court and Cause.]

Decision of Court.

Appearances:

MALONY & COBB,

For Plaintiff.

L. P. SHACKLEFORD,

JOHN RUSTGARD,

For Defendants.

This is a suit by plaintiff against the defendant J. J. McGrath and his tenant for the recovery of the possession of real property and damages for its detention.

The plaintiff filed his complaint in this court, April 26, 1907, alleging in three causes of action:

1. That the plaintiff is the owner of Lot 1, Block 3, in the town of Juneau, Alaska.
2. That plaintiff is the owner of Lots 2 and 3 in said block.
3. That plaintiff is the owner of a portion of Lot

1 in Block G described in said complaint.

That defendants in 1901 wrongfully ejected plaintiff from a portion of the several tracts above described and alleging the rental value of such portion.

The defendant McGrath answered in said cause, denying the cause of action in plaintiff's complaint and interposing an affirmative defense alleging the entry of the townsite of Juneau, the 13th day of October, 1893, and patenting of the townsite September 4th, 1897; that in 1882 defendant's [349] grantor entered and took possession of certain of said lands, including all the land claimed by plaintiff and defendant; that defendant acquired these lands from him December 9th, 1889, and remained and was in the actual occupation and exclusive possession on the date of the entry of the townsite, making valuable improvements thereon; that the trustee of said townsite gave notice pursuant to the regulations of the Secretary of the Interior that he would, on the 15th day of November, 1897, set apart lots and parcels of land in said townsite to the occupants thereof; and thereafter on the 20th day of July, 1898, the plaintiff falsely and fraudulently represented to the trustee that he and his grantors were the owners, entitled to the possession of the lands described in plaintiff's complaint; and the trustee on said date did "actually hear and determine on said false and fraudulent statements the said questions of said occupancy and ownership of said lots and acting under the belief that said statements were true, executed to the plaintiff a trustee's deed" conveying to plaintiff Lots 1 and 3, in Block 3, and that

portion of Lot 1, in Block G, described in the complaint; that upon a contest between plaintiff and defendant before the trustee concerning Lot 2 in Block 3 the trustee on the 28th day of March, 1899, made a decision awarding the defendant a portion of said lot; that upon the plaintiff's appeal said decision was affirmed by the Commissioner of the General Land Office, and the Secretary of the Interior and the trustee deeded the same to defendant; the defendant prays to be decreed the owner, entitled to the possession of all the land in dispute, and further prays that the plaintiff be compelled to convey to the defendant the portions of Lot 1 and 3 in Block 3, and Lot 1 in Block G included within the boundaries of the property conveyed to him as alleged. [350]

Upon the motion of plaintiff for judgment on the pleadings judgment was entered in this court in 1908 decreeing that plaintiff recover from the defendant possession of the southeast corner of Lot 1, Block 3, being a triangular piece of ground $3\frac{1}{3}$ feet by $3\frac{1}{3}$ feet by $1\frac{1}{2}$ feet, and two parcels of ground in Lot 3, Block 3, awarding the plaintiff damages for the detention of said property in the sum of One Thousand One Hundred and Twenty-eight Dollars (\$1128), said judgment upon motion of plaintiff to dismiss the third cause of action as affecting the land in Lot 1 in Block G it was so adjudged. Upon writ of error to the Court of Appeals sued out by the defendant said cause was reversed and remanded on account of the judgment being given for the amount of damages prayed in the complaint over the

general denial in defendant's answer.

167 Federal 473.

Upon the coming down of the mandate to this court the defendant McGrath interposed a farther amended answer, which in addition to general denials of the allegations of plaintiff's complaint pleads to each of said causes of action the defense of seven years actual, uninterrupted, exclusive, adverse, open, notorious, continuous and hostile possession and occupancy of the premises in controversy immediately prior to the commencement of the action, under color and claim of title.

2. Alleging that neither the plaintiff nor any of his ancestors, predecessors or grantors were seized or possessed of the premises described in said causes of action at any time within ten years before the commencement of this action.

And by way of cross-complaint, for the purpose of securing equitable relief against the plaintiff, defendant alleges as in his former answer his purchase on the 9th day of [351] December, 1889, of that portion of Lot 1, Block 3, in dispute in the southeast corner of said lot, describing it as being 3.6 feet by 3.6 feet by 11½ feet, alleging the entry of the townsite as above by the trustee and that at the time of said entry the defendant was the sole owner and sole and actual occupant of the premises described; that nevertheless on the 3d day of December, 1897, while defendant was in such possession and occupancy and had permanent and valuable improvements thereon, the plaintiff falsely and fraudulently, with intent to deceive and mislead the trustee into believing that

plaintiff was and had been prior to and at the time of the entry the actual occupant of said premises and entitled to a deed therefor and with the intent of cheating and defrauding defendant and depriving him of his property, represented that he was at the time of entry the actual occupant and owner of said premises and the whole thereof, and by reason of such representations, the trustee did, on July 13, 1898, deed all of Lot 1, Block 3, to plaintiff; that defendant had no notice or knowledge of the application or the fact that a deed had been issued for a long time thereafter and alleges that no time has ever been fixed by the Secretary of the Interior or any other officer under him within which parties are required to file their applications for deeds with the trustee and alleging that no such notice had been given by the trustee; that said deed is wholly void and constitutes a cloud upon defendant's title; that on January 18th, 1898, the defendant made application to the trustee for the premises owned and occupied by the defendant in said blocks; that it was erroneously described as lying between Lots 2 and 3, in Block 3, whereas these lots joined, the one upon the other; that defendant upon discovering this error employed a surveyor who surveyed the land claimed by him and defendant's application [352] for deed was amended to conform to said survey; that said survey was erroneous in that it failed to disclose defendant's occupancy of that portion of Lot 1, Block 3, described; that at the time of this survey the defendant had erected and maintained a large two-story store building on said premises,

and that the westerly side wall of said building stands upon, includes and covers all of said premises; that this could be seen without difficulty upon inspection of the premises, but that the lines and corners of the various lots into which the townsite had been divided by the survey of the townsite trustee were not marked and the boundaries of the various lots in said townsite could not be determined by anyone except a surveyor with the proper instruments for the purpose, and even then with the greatest difficulty; that the surveyor employed by the department failed to find the lines and corners of Lot 1, Block 3, and failed to disclose in his survey that said building covered said portion of said lot; that on the 14th day of January, 1901, pursuant to such application the trustee executed a deed intending to convey to the defendant the premises described in said cross-complaint.

Concerning the second cause of action, the cross-complaint alleges color and claim of title since the 9th day of December, 1889, to the premises in dispute and farther alleges the entry of the townsite, defendant's occupancy at that time, the maintenance of valuable improvements upon the land; plaintiff's fraudulent application to the trustee for deed and the deeding by the trustee as alleged in the first cause of action of all of Lot 3 in Block 3 to the plaintiff; that this deed included a portion of the land occupied and owned by the defendant; that on January 3, 1898, defendant applied to the trustee for the premises owned by him in said blocks; that said application was faulty and defective in the manner above [353]

described because of the defect in defendant's deed; that defendant caused said parcel of land to be surveyed and said application amended in December, 1898, but that prior to the filing of said amended application, the trustee had already executed a deed to Lot 3, Block 3, to the plaintiff herein and the trustee ruled that he had parted with all title to Lot 3 and had no farther jurisdiction in the matter, but a deed not having been executed for Lot 2 a hearing was ordered to determine plaintiff's and defendant's rights therein; that upon such hearing the trustee determined that the defendant was entitled to a deed to all of the premises occupied by him in said lot; that in describing said premises in his decision, the trustee, through inadvertence and mistake, omitted a strip of ground off the north side of the land deeded to defendant a foot and 6 inches wide, which at the time of the entry of the townsite and ever since has been covered in its entirety by a resident block of the defendant. That at the time of the decision both plaintiff and defendant and the trustee believed the description covered and included all of the premises in Lot 2 covered by the house of the defendant.

Defendant further alleges that as concerning the first cause of action that all that portion of Lot 3 Block 3 occupied by him was deeded to the plaintiff by the trustee without notice to the defendant or knowledge by him until long after the deed had been issued. Defendant prays that plaintiff be decreed a trustee, holding title to said premises in trust for the defendant and be ordered and decreed to convey the

same by proper instrument to the [354] defendant; that the deed issued by the trustee to the defendant be reformed and that the defendant be decreed the sole owner in fee of the land involved and for general equitable relief.

Plaintiff demurs to the sufficiency of the pleas of the statutes of limitation to the causes of action and also denies the same. Plaintiff admits that he applied to the trustee at the times mentioned in the cross-complaint and received deeds to the lands described but denies the other allegations connected therewith. He denies fraud and the errors and mistakes alleged in the cross-complaint of the trustee and surveyor; alleges that the decisions of the trustee have never been reversed, annulled or modified. Plaintiff admits a mistake in the description in *Rxhibit* "A" attached to defendant's cross-complaint if the exhibit is a correct copy of the instrument.

Upon the trial a large amount of evidence was introduced including the record in the contest before the trustee over Lot 2 in Block 3, the findings of the trustee and the Commissioner and secretary upon appeal from the trustee's decision.

The evidence shows that the town of Juneau was settled and lots and blocks surveyed, allotted and occupied by the settlers in 1880; the lots in Block 1 as originally located were 50 feet wide by 200 feet long; that prior to the entry of the townsite by the trustee Block 1 had been divided into four blocks leaving the lots 50 feet by 100 feet; that the lots in Block 1 and 3 fronted on the north side of Front Street, Front

Street coinciding with the beach or water front of Gastineaux Channel; that original Block 1 was a long block and that for purposes of convenience prior to the entry of the townsite Seward Street was put through the middle of [355] Block 1 from Front Street; that Seward Street was 34 feet wide, whereas the lots in the block were 50 feet wide. This, it is claimed, left a fraction of a lot in Block 3 but the lots were as it appears rearranged full 50 foot lots being recognized at each end of Block 3, the defendant and his predecessors in interest giving and receiving deed to land described as that "certain piece or parcel of land situated, lying and being between Lots 2 and 3 in Block 3, as per Hanus plat." This it would appear was an effort to fix this fraction which had become afloat.

The official survey of the townsite was approved by the United States Marshal, ex-officio Surveyor General, on the 21st day of October, 1892, and the entry of the townsite made on the 13th of October, 1893. By this official survey there was no parcel or fraction of land left between Lots 2 and 3.

A great part of the evidence introduced concerning early occupancy and possession of the premises involved is contradictory and unsatisfactory, but this much is clear:

Regarding the land described in the third cause of action in the complaint, as this cause of action was dismissed on plaintiff's own motion upon the first trial, I hold that that matter is now closed, and there will be no further judgment concerning it.

It would appear that no reasoning or authority

other than that contained in the former decision of this case by the Court of Appeals, 167 Fed. 473 and *Miller vs. Margrie* by the same court, 149 Fed., 694, is necessary on the question of any fraud, accident or mistake in the issuance of the patents to plaintiff; It was held in those cases that persons claiming the right to obtain legal title to lots in the town of Juneau are required to make application therefor to the townsite trustee * * * that no allegations of fact showing how or the means whereby the plaintiffs were prevented from [356] having knowledge of the hearing before the townsite trustee and there litigating the right of possession in lots sued for were made, nor was it shown that such want of knowledge or want of opportunity to be heard before said townsite trustee was induced or caused by the defendant.

The Court held that it was incumbent on the plaintiffs to allege facts showing that without negligence on their part they were prevented from appearing before the trustee." In this case there has not been sufficient or any evidence on the part of the defendant to bring him within the foregoing requirements.

But to reason further:

As to the parcel of land described in the first cause of action in the Southeast corner of Lot 1 Block 3, I do not find any evidence of fraud on the part of the plaintiff let alone that clear, unequivocal and convincing evidence of fraud which is required to set aside or vary solemn instruments, as the patents issued to the plaintiffs in this case.

Maxwell Land Grant Case, 121 U. S. 325.

U. S. vs. American Bell Telephone Co., 167 U. S.

In fact the pleading of the defendant excusing himself for not knowing where the corner of this lot was until long after the erection of his building would itself tend to preclude any imputation of fraud on the plaintiff's part in claiming the entire lot.

The regulations of the Department of the Interior June 12, 1903, regarding the townsite in Alaska provide that the trustee "will observe and follow as strictly as the platting of the townsite will permit the rights of all parties to the property claimed by them as shown by the records of the Clerk of the District Court of Alaska." [357]

It is the policy of this law and its administration to award the entire lot to the occupant and bring the possession and interest of the occupants of the townsite into something like order and not leave their holdings interlocked and dovetailed.

Carter vs. Ruddy, 166 U. S. 493.

The system of surveys and disposal of all Government lands, agricultural, timber, mineral and townsite, contemplates the disposition of the same in rectangular parcels or at least with straight parallel side and end lines as more orderly, less wasteful and most beneficial to all concerned. For this reason, if not otherwise, the trustee should have the authority to straighten a ragged, irregular boundary between occupants, even if in so doing such straightened boundary necessarily excluded portions of an occupant's improvements of small value.

It appears by the evidence that at the time the defendant erected the two-story frame building upon his land, which is proven to have cost upwards of

\$4,000.00 that the foundation was laid to include this corner of land and the matter was called to the attention of the agents of the owner and the question then considered of notifying the defendant and preventing his building the same so far to the westward as to include this ground, but no such steps were taken and plaintiff's predecessor in interest permitted the building to be completed without so doing. Under these circumstances it appears inequitable to award this ground to the plaintiff and allow him to chop a hole in the side of a valuable building and very materially damage and disfigure it. In fact it would not appear to be any abuse of discretion to ignore the encroachment upon this small fraction of ground under the *maxim de minimis non curat lex*. [358]

The order of the Court will be that the plaintiff will be enjoined from entering into the possession of this ground or recovering the same from the defendant, but will be allowed sixty days within which to institute a suit for the recovery of its value and damages, if any, to the remainder of the tract which issue may be framed in this suit and jurisdiction retained for that purpose or an independent suit as plaintiff shall upon consideration deem advisable, such injunction to remain in effect until sixty days after execution upon any money judgment obtained in such suit shall be returned unsatisfied, and until the further order of this Court.

Regarding the land in controversy in Lot 3 Block 3 involved in the second cause of action as set forth in the complaint and also in the cross-complaint, I am of the opinion that plaintiff should recover possession as prayed.

The defendant in his original answer stated that the trustee gave notice pursuant to the regulations of the Secretary of the Interior that he would on the 15th day of November, 1897, set apart lots and parcels of land in said townsite to the occupants. It also was so stipulated upon the trial. On December 3d, 1897, the plaintiff filed his application with the trustee for the lands embraced in Lots 2 and 3 of Block 3.

On January 3d, 1898, the defendant filed his application for deed, defective as above set out, in that it described the land claimed by him as lying between Lots 2 and 3 in Block 3 instead of describing it according to the official plat.

The plaintiff did not receive the patent to Lot 3 until July 20, 1898. It is therefore concluded that as long as defendant's deed and the record thereof did not disclose any occupancy or interest of his in Lot 3 that in so far as the Government in regulating the disposal of its lands is [359] concerned the notice which it is admitted the trustee gave is sufficient.

Miller vs. Margrie, supra.

Valentine vs. McGrath, supra.

I further conclude that inasmuch as it is shown that the defendant filed his application for the lands claimed by him as described in the only deed he had, long prior to the patenting of any land to plaintiff, that he had notice that the trustee was disposing of the lots and that he cannot therefore complain for want of notice. That if there was a mistake made by the trustee, he was misled thereto by the representations of the defendant himself and that he cannot

now complain on account thereof; it was a blunder on defendant's part and in no sense a mutual mistake of his and the plaintiff.

Vol. 20, 2nd Ed., Am. & Eng. Ency.

Law, page 816 b b, and citations.

That portion of Lot 3 which the defendant claims to own and occupy juts into the west side of Lot 3 in such an irregular manner as to destroy its uniform outline and to a great extent the usefulness of the remainder and I am of the opinion that the injury to the remainder of the property would be greater than the benefit to the defendant and that the trustee was authorized under the cases above cited and the regulations above quoted in awarding all of Lot 3 to the plaintiff, had all the facts been before the trustee.

Further, it is alleged by the defendant in his original answer that the trustee did "actually hear and determine on said false and fraudulent statements the said questions of said occupancy and ownership of said lots and acting under the belief that said statements were true, executed to the plaintiff a trustee's deed" conveying to plaintiff Lot 3 in Block 3. [360]

It was further proven and conceded that if the trustee made any mistake it was one of fact regarding the occupants and rights of occupancy of Lot 3 and not one of law under conceded facts. This being true, the decision of the trustee is conclusive in the absence of fraud which as shown has not been proven.

New Dunderberg Mining Co. vs. Old et al., 79 Fed. 598.

King vs. McAndrews, 111 Fed. 860.

The cases called to my attention by counsel for the defendant are cases, not where the trustee mistak-

only decided concerning occupancy but where under the facts he made a mistake in the law.

Regarding the disputed area in Lot 2 of Block 3 the decision will be the same for the reasons which have already been given, and the additional reason that the defendant again himself misled the trustee regarding the extent of his occupancy by his amended application for location.

There was no evidence to show the Court upon the trial that this was in any wise a mutual mistake of plaintiff and defendant, although so plead. It is likewise apparent that to so hold would not be inequitable as it is shown that the defendant's original holding was only 100 feet deep from Front Street and that he has encroached to the rear until it has become 120 feet deep and now seeks to extend that.

Although the defendant by his cross-complaint has sought to invoke the equitable powers of the Court and ask equity, he has at no time tendered or offered to pay the plaintiff any part of the \$48.00 assessed by the trustee against each of lots 1 and 3 in Block 3 for the administration of the trust and paid by the plaintiff. [361]

Regarding the defense of the ten year statute of limitations I am of the opinion that the defendant cannot invoke this statute in this case. This is a strictly legal defense and to allow the defendant the benefit thereof would be to allow him to collaterally attack the trustee's finding of plaintiff's occupancy at the time of the execution of the patents.

The town of Juneau was settled and these lands first occupied about 1880.

The official survey for entry of townsite was made in 1892.

The entry of townsite was made in October, 1893.

The plaintiff and defendant were then occupants of these adjoining lands.

Patent was made to trustee in 1897.

The plaintiff applied to trustee for disputed lands 1897.

The defendant applied to trustee for his lands in January, 1898.

Patents were issued by trustee to plaintiff in July, 1898.

This suit was begun in April, 1907.

The ten year and seven year statutes of limitations relied upon by the defendant are as follows:

“Sec. 4. WITHIN TEN YEARS. The periods prescribed in section three of this act for the commencement of actions shall be as follows:

“Within ten years actions for the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintained for such recovery unless it shall appear that the plaintiff, his ancestor, predecessor, or grantor was seized or possessed of the premises in question within ten years before the commencement of the action; Provided, in all cases where a cause of action has already accrued, and the period prescribed in this section within which an action may be brought has expired or will expire within one year from the approval of this act, an action may be brought on such cause of action within one year from the date of the approval of the act.”

“Sec. 1042. TITLE BY ADVERSE POSSESSION. The uninterrupted adverse notorious possession of real property under color and claim of title for seven years or more shall be conclusively presumed to give title thereto except as against the United States.” [362]

It is the contention of defendant's counsel that the statute of limitations commenced to run against the plaintiff the moment his right of action accrued, that in Alaska the right of action accrued the moment ouster took place, although the record title was still in the Government. To this point the following cases are cited:

Wilson vs. Fine, 38 Fed. 789.

Mickey vs. Stratton, 5 Sawyer, 475.

Campbell vs. Silver Bow Basin M. Co., 49 Fed. 47.

Miller vs. Blackett, 47 Fed. 547.

Davis vs. Dennis, 85 Pac. 1079.

Copper River Lumber Co. vs. Humphrey, 2
Alaska, 39.

None of these cases involved the question of the statute of limitations. They simply held that one in the peaceable and quiet possession of real property can eject and recover the same from a mere trespasser or intruder.

To this point plaintiff's counsel further relies upon:

Missouri Valley Land Co. vs. Wiese, 208 U. S.
234.

Iowa R. R. Land Co. vs. Blumer, 206 U. S. 482.

Eastern Oregon Land Co. vs. Brosnan, 173 Fed.
67.

Boe vs. Arnold, 102 Pac. 290.

But all of these latter cases were cases where it was held that the possession of land although in admitted subordination to the United States from which the person in possession is seeking to obtain title may nevertheless be adverse to everyone else and when continued for the statutory period may be set up in bar to an action by one claiming under a prior grant. In all of these cases there had been a prior grant *in praesenti* by which the adverse party had been seized of title and right of possession. The plaintiff in this case was not seized of title under any grant from the Government until the issuance of his patent. [363]

To start the statute of limitations running against the plaintiff he must have been disseized and in order to be disseized he must at some time have been seized of title, either of fee or freehold and this he was not until the issuance to him of patent.

Tyee Con. Mining Co. vs. Langstedt, 136 Fed. 124, and cases cited, page 126.

It has been argued by counsel that this case is overruled by the Eastern Oregon Land Co. vs. Brosnan, *supra*, but I conclude as above pointed out that the latter decision is not sufficiently far reaching to have the effect contended for.

Counsel for defendant further contends that even if the statute did not commence to run until the Government had parted with title, this took place at the time entry was made by the townsite trustee October 13, 1893, 14 years before the commencement of this action and counsel relies upon the authority of *Ashby vs. Hall*, 119 U. S. 526. That decision was

to the effect that the trustee could not dispose of an alley in the City of Helena, Montana, of which an occupant of a lot in that city had the use and benefit at the time of the entry of the townsite in such manner as to deprive him of that right. The rights and interest of such occupant in the highways of the City of Helena might be a vested right before the bounds and extent of his interest in lots had been determined and title by patent thereto vested in him. The scope of that decision is shown by the following therefrom—"These regulations (referring to the statutes of the territory) might extend to provision for the ascertainment of the nature and extent of the occupancy of different claimants of lots and the execution and delivery to those found to be occupants in good faith of some official recognition [364] of title in the nature of a conveyance, but they could not authorize any diminution of the rights of the occupants *when the extent of their occupancy was established*. It is the delay, the duration of time after title seized, that raises the bar of the statute; this may not be by relation, else one ought be barred before time seized.

Such occupants would not be seized of title to any particular tract of land until the extent of their occupancy was determined and established by the trustee which and the date thereof is alone evidenced by the patent. The trustee is not a naked trustee for the purpose of holding title but he is charged with the duty of officially determining questions of fact, if not of law, concerning the rights of parties in the townsite, their occupancy and the extent

thereof and to require the payment of assessments in the nature of purchase money by the occupants prior to the issuance of patent.

It is therefore clear that any decisions upholding the right of action on an equitable title *when nothing more remains to be done by the claimant are not applicable.*

The lands contended for in Lot 2 Block 3 would not be affected under this contention because of the amended application of the defendant falling short of his now claimed occupancy on the northwestern line of his holdings in that lot. The application in this shape would itself be sufficient to warrant the conclusion that his occupancy if any beyond that line was not adverse. Patents were not issued to the parties in this lot until after the contest of 1901.

Defendant showed no color of title to render applicable the seven year statute of limitation. The plaintiff himself testified and attempted to qualify as an expert [365] on the rental value of his property which the defendant had been withholding from him. This was merely opinion upon his part and the Court is not inclined to be bound by his opinion nor follow the rule by which he arrived at the rental value, as there was no other evidence on this question; he will be allowed the nominal amount of \$10.00 for the detention of all parcels of property hereby awarded him during the time herein involved.

Plaintiff by his complaint sought to recover all of Lot 2, Block 3, the greater part of which was held by defendant under trustee's deed and covered with valuable improvements of the defendant, and as the

defendant by his cross-complaint seeks to recover other lands herein awarded to plaintiff, neither party will recover costs. The decree will confirm in all things the deeds of the trustee.

Done in open court this 16th day of May, 1910.

EDWARD E. CUSHMAN,

District Judge.

[Endorsed]: Original No. 613-A. In the District Court of the United States for the Div. One of Alaska. Emery Valentine vs. J. J. McGrath and S. Hirsch. Decision of Court. Filed May 16, 1910. H. Shattuck, Clerk. By M. H. McLellan, Assistant.
[366]

[Title of Court and Cause.]

Writ of Error.

UNITED STATES OF AMERICA.—ss.

The President of the United States of America to the Judges of the District Court for Alaska, Division No. 1, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, or some of you, between Emery Valentine, Plaintiff, and J. J. McGrath, and S. Hirsch, defendants, a manifest error hath happened, to the great prejudice and damage of the said plaintiff, Emery Valentine, as is said and appears in the petition herein;

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in that behalf, do com-

mand you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, State of California, together with this writ, so as to have the same at said place in said Circuit, on or before thirty days after the date hereof, so that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and justice and according to the laws and customs of the United States should be done.

Witness the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, this the 3d of June, 1911.

Attest my hand and the seal of the District Court for [367] Alaska, Division No., on the day and year last above written.

E. W. PETTIT,
Clerk.

By J. J. Clarke,
Deputy Clerk. [368]

[Endorsed]: Original. No. 613-A. In the District Court for Alaska, Division No. 1, at Juneau. Emery Valentine, Plaintiff, vs. J. J. McGrath, S. Hirsch, Defendant. Writ of Error. Filed and Served by Deposit of a Copy. June 3, 1911 E. W. Pettit, Clerk. By J. J. Clark, Deputy. [369]

[Title of Court and Cause.]

Citation in Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America to
J. J. McGrath, and S. Hirsch, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error, filed in the clerk's office of the District Court for Alaska, Division No. One, wherein Emery Valentine is plaintiff, and you are defendants in error, to show cause, if any there be why the judgment mentioned in said writ of error should not be corrected, and speedy justice done to the parties in that behalf.

Witness the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, this 3d day of June, 1911, and of the Independence of the United States the one hundred and thirty-fifth.

EDWARD E. CUSHMAN,
Judge.

Service of the above and foregoing citation in error is admitted to have been duly made, this 3d day of June, 1911.

LEWIS P. SHACKLEFORD,
Attorney for J. J. McGrath and Defendants in
Error.

S. HIRSCH,
For Himself. [370]

[Endorsed]: Original. No. 613-A. In the District Court for Alaska, Division No. 1, at Juneau Emery Valentine, Plaintiff, vs. J. J. McGrath, S. Hirsch, Defendants. Citation in Error. Filed June 3, 1911. E. W. Pettit, Clerk. By _____, Deputy.

[Title of Court and Cause.]

Praeipice for Transcript.

To the Clerk of the District Court for Alaska, Division No. 1:

You will please make up a transcript of the record upon the writ of error in the above-entitled cause and include therein the following pleadings and papers, to wit:

- (1) Complaint.
- (2) Answer of S. Hirsch.
- (3) Second amended answer of J. J. McGrath, filed January 5, 1910.
- (4) Reply to answer of J. J. McGrath, filed January 29, 1910.
- (5) Findings of fact and conclusions of law, filed June 16, 1910.
- (6) Judgment, June 21, 1910.
- (7) Bill of Exceptions, filed June 3, 1911.
- (8) Petition for writ of error.
- (9) Assignment of error.
- (10) Bond.
- (11) Order extending time to file transcript.
- (12) Order to attach affidavits, etc. to bill of exceptions.

- (13) Opinion of Court, filed May 16, 1910.
- (14) Original writ of error.
- (15) Original citation.
- (16) This praecipe.
- (17) Certificate.

Said transcript to be made in accordance with rules of practice of the U. S. Circuit Court of Appeals for the Ninth Circuit and the rules of this Court.

J. H. COBB,
Attorney for Emery Valentine.

[Endorsed]: Original. No. 613-A. In the District Court for Alaska, Division No. 1, at Juneau. Emery Valentine, Plaintiff, vs. J. J. McGrath, Defendant. Praecipe for Transcript. Filed Jul. 13, 1911. E. W. Pettit, Clerk. By J. J. Clarke, Deputy. Malony and Cobb, Attorneys for _____. Office: Juneau, Alaska.

[Endorsed]: Copy. No. 613-A. In the District Court *for* the District of Alaska, at Juneau. Emery Valentine, Plaintiff, vs. J. J. McGrath et al., Defendants. Praecipe for Transcript. [372]

[Clerk's Certificate to Transcript.]

[Title of Court and Cause.]

I, E. W. Pettit, Clerk of the District Court for the District of Alaska, Division No. One, do hereby certify that the foregoing and hereto attached three hundred, seventy-two pages of typewritten and written matter, numbered from one to three hundred and seventy-two, both inclusive, constitute a full, true and correct copy of the record, and the whole thereof prepared in accordance with the Praecipe of the

plaintiff and plaintiff in error on file in my office and made a part hereof, in Cause No. 613-A of the above-entitled Court, wherein Emery Valentine is plaintiff and plaintiff in error, and J. J. McGrath and S. Hirsch are defendants and defendants in error.

I do further certify that the said record is by virtue of Writ of Error and Citation issued in this cause, and the return thereof in accordance therewith.

I further certify that this transcript was prepared by me in my office, and that the costs of preparation, examination and certificate, amounting to One Hundred Sixteen and 80/100 Dollars (\$116.80) have been paid to me by Malony and Cobb, attorneys for plaintiff and plaintiff in error.

[Written on side:] By J. J. C. E. W. P.

In witness whereof I have hereunto set my hand and affixed the seal of the above-entitled court this 8th day of August, 1911

[Seal]

E. W. PETTTT.

Clerk of District Court, Dist. of Alaska, Division
No. 1.

[Endorsed]: No. 2016. United States Circuit Court of Appeals for the Ninth Circuit. Emery Valentine, Plaintiff in Error, vs. J. J. McGrath and S. Hirsch, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court for the District of Alaska, Division No. 1.

Filed August 15, 1911.

F. D. MONCKTON,
Clerk.

By Meredith Sawyer,
Deputy Clerk.